CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

October Term, 1946

No. 535

MYRL ALEXANDER WARDEN, PETITIONER

vs.

UNITED STATES, EX REL. JOHN MYRON SULICK

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 4, 1947

CERTIORARI GRANTED JANUARY 20, 1947

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UNITED STATES CIRCUIT COURT OF APPEALS

SECOND CIRCUIT.

OCTOBER TERM 1946

JOHN MYRON KULICK
Petitioner-Appellant

v.

M. L. KENNEDY, WARDEN
Respondent-Appellee

DISTRICT OF CONNECTICUT
APPEAL FROM THE UNITED STATES DISTRICT COURT

TRANSCRIPT OF RECORD

Statement under Rule 13, Subdivision 4

This is an appeal from an order of the United States District Court for the District of Connecticut discharging the writ of habeas corpus and remanding petitioner-appellant to the custody of M. L. Kennedy, Warden, respondent-appellee.

John Myron Kulick, petitioner-appellant, is committed to the custody of the Attorney General for a period of three and one-half years, under a judgment based on a conviction for alleged violation of the Selective Training and Service Act of 1940, as amended, because of refusing to submit to induction. He is in the custody of the respondent Warden of the Federal Correctional Institution at Danbury, Connecticut, by reason of such judgment.

On the 27th day of February, 1946, petitioner-appellant filed and presented to the court below his petition for writ of *habeas corpus*. In the petition he claimed that the judgment of conviction, whereby he is restrained by respondent-appellee, is void and subject to collateral attack. The grounds were, *inter alia*, that, upon the trial of the indictment, he was deprived of a judicial trial, his rights to make his defenses and procedural due process, contrary to the Constitution.

After considering the petition, the judge of the court below issued the writ of *habeas corpus* on the 27th day of February, 1946, and made it returnable on the 13th day of March, 1946. On the 7th day of March, 1946, the respondent filed his return to the writ and, thereafter, on the 16th day of March, 1946, filed a supplemental return to the writ.

Pursuant to stipulation the hearing of the writ and the returns was adjourned to March 22, 1946.

On the 22nd day of March, 1946, the hearing and arguments were had upon the writ of *habeas corpus* before the Honorable Carroll C. Hincks, Judge of the United States District Court for the District of Connecticut.

On the 6th day of May, 1946, Judge Hincks discharged the writ of *habeas corpus* and remanded the petitioner-appellant to the custody of respondent. He wrote a memorandum opinion, together with findings of fact and conclusions of the law. The order discharging the writ and remanding petitioner to the custody of respondent was entered and filed with the clerk of the court below on the 6th day of May, 1946.

On the 1st day of June, 1946, petitioner-appellant filed his notice of appeal. On the 4th day of June, 1946, he filed his appeal bond.

On the 20th day of June, 1946, the court below entered and filed with the clerk an order allowing petitioner-appellant to be admitted to bail and releasing him from custody of the respondent pending the determination of this appeal.

On the 26th day of June, 1946, the court below entered orders extending the time for filing transcript of the record upon appeal with this court to and including August 1, 1946, and directed that the exhibits should be sent up to this court in their original form.

The record upon appeal has been duly prepared, agreed upon by counsel, certified by the clerk of the court below and duly filed in this cause with this court.

Docket Entries

No. 1671 Civil

Feb.	27, 1946	Petition for writ of habeas corpus filed.
"	" "	Order to show cause returnable March 13, 1946 at 10:30 A. M. filed and entered (Hincks, J.) and with copies of same handed to the Marshal for service.
"	" "	Writ of habeas corpus issued and with copies of said petition handed to the marshal for service.
Mar.	1 "	Writ returned showing service.
"	7 "	Return of respondent M. L. Kennedy filed. Duplicate mailed to Carl A. Mears, Esq.
"	16 "	Supplemental return of respondent M. L. Kennedy filed. Copy of same mailed to Hayden Covington, Esq. and to Carl A. Mears, Esq.
"	22 "	Hearing had on writ of habeas corpus. Gov. Ex. 1, 2 & 3 were filed. Decision reserved. Briefs to be submitted.
"	28 "	Brief of respondent filed and was handed to Judge Hincks. Copy of same mailed to Hayden Covington, Esq.
Apr.	11 "	Written exceptions to Court's charge, S.D. New York, filed.
May	6 "	Memorandum of decision, findings of fact, discussion and conclusions and order filed and entered. (Hincks, J.)

June 1	"	Notice of appeal filed. Copy of same mailed to the U. S. Attorney.
" "	"	Application for bail pending appeal to the U. S. Circuit Court of Appeals for the Second Circuit filed. Copy of same mailed to the U. S. Attorney.
" "	"	Order denying bail pending appeal filed and entered. (Hincks, J.)
" 4	"	Appeal bond filed.
" 17	"	Certified copy of order in #1803 Eastern District of Virginia filed.
" "	"	Petition for admission to bail, & affidavit filed.
" 20	"	Hearing had on motion for bail. Motion granted. $2,000.00 bond to be furnished.
" "	"	Order for release filed and entered. (Hincks, J.)
" "	"	Bail bond filed and approved. (Hincks, J.)
June 21	"	Certified copy of order for release and bond, mailed to M. L. Kennedy, Warden, at Danbury.
" 26	"	Petition for extention of time to file transcript of record and order extending time filed and entered. (Hincks, J.)
" "	"	Praecipe for transcript of record filed. Proof of service by mail filed. Order on application that Clerk send original exhibits to C. C. A. entered. (Hincks, J.)

PETITION
for Writ of Habeas Corpus

No. 1671 Civil

[Filed Feb. 27, 1946]

To Said United States District Court:

Now comes JOHN MYRON KULICK, hereinafter called Petitioner, and complains of M. L. KENNEDY, WARDEN, respondent, and as grounds for relief respectfully shows:

1. Petitioner is a citizen of the United States and a resident citizen of the State of New York. Respondent is a citizen of the United States and a resident of the State of Connecticut.

2. Petitioner is now imprisoned and illegally deprived of his liberty by respondent in the Federal Correctional Institution, one of the United States Prisons operated by the Department of Justice, located at or near the City of Danbury in the County of Fairfield and in the State and the Federal District of Connecticut. Respondent is the warden in charge of said Federal Correctional Institution.

3. The cause or pretense of such illegal imprisonment and restraint of petitioner is a judgment rendered and entered on the 7th day of May, 1945, in the District Court of the United States for the Southern District of New York, in a certain numbered cause on the docket of said court whereby said petitioner was found guilty of violating Title 50, United States Code, Section 311, in that he allegedly did unlawfully and knowingly fail and neglect to perform a duty required of him under and in execution of the Selective Training and Service Act of 1940 and the rules and regulations duly made pursuant thereto, in that he failed and neglected to submit to induction into the armed forces of the United States, and thereupon was committed to the custody of the Attorney General or his authorized

representative for imprisonment for a period of three and one-half (3½) years. No fine or costs were imposed upon petitioner in said judgment. A copy of said judgment and commitment is attached hereto and marked as EXHIBIT A, and is incorporated herein and made a part thereof.

4. Said imprisonment and restraint are illegal and the judgment and commitment are void because

(a) The indictment (copy of which is attached hereto and marked as EXHIBIT B and incorporated herein and made a part hereof) and all subsequent proceedings were void for the reason that the draft boards and the armed forces did not have jurisdiction to order the petitioner to submit to induction because he was known to the boards to be and was a "[redacted] ordained minister of religion" exempt from all [redacted]ning and service under the Act, and the action of the boards constituted a violation of due process of law; and

(b) the indictment and all subsequent proceedings were void for the reason that the United States District Court for the Southern District of New York did not have jurisdiction of the offense because the delinquency proceedings by the boards to institute the prosecution were void since the orders to report for and submit to induction were void, and the action of the boards and of the armed forces constituted a violation of due process of law; and

(c) the judgment and commitment are void because upon the trial petitioner was denied the right of trial by jury and his right to prove any substantial defense to the indictment under his plea of "not guilty", contrary to Article III of the Constitution of the United States and the Fifth and Sixth Amendments thereto.

Petitioner alleges hereinafter in greater detail the reasons why said imprisonment and restraint are illegal. Upon

a hearing hereof petitioner expects to make good each and every allegation of this petition.

5. Your petitioner duly registered under the Act with Local Board 254 for Queens County, Jackson Heights, New York. He was assigned Order Number 12481. Thereafter he filed his Selective Service Questionnaire (DSS Form 40) with the said local board in the time and manner required by law. Petitioner, in Series IV of said questionnaire, gave his occupation as pioneer missionary evangelist establishing churches for the Watchtower Bible and Tract Society, and ordained minister preaching the Gospel of God's Kingdom. Said Society is duly recognized by the Selective Service National Headquarters as a religious organization within the meaning of the Act. In Series VIII, petitioner showed that he was a minister of religion and customarily served as such minister and was formally ordained long prior to filing his questionnaire by said recognized religious organization. He established that he was a duly ordained minister of religion. He requested that the local board recognize and grant his exemption provided by Section 5 (d) of the Act and place him in Class IV-D pursuant to Section 622.44 of the Regulations. He attached to his questionnaire a statement and other evidence which was undisputed, giving substantial and uncontradicted proof that he was an ordained minister of religion serving full time as a pioneer minister and missionary evangelist of Jehovah's witnesses, preaching the Gospel of God's Kingdom. He explained that the purpose of his ministry was to give a testimony before the people that Jehovah is the Almighty God. He quoted his Scriptural ordination from Isaiah 61: 1-2. He filed a copy of his certificate of ordination from the Watchtower Bible and Tract Society. The local board refused to recognize his claim for exemption and classification in IV-D and illegally classified him in Class 1-A on March 30, 1943, making him liable for train-

ing and service. He requested a personal appearance in which he protested against this classification and filed therewith affidavits from other ministers attesting to his status as an ordained minister and corroborating previous evidence. The local booard declined to grant the personal appearance but informed him his case was being reconsidered. Thereafter the local board recognized his ministerial claim and provided him with Class IV-D on May 5, 1943. The petitioner was retained in such classification and exempt status for over fifteen months when, without previous notice to him of a reopening of his classification, he was deprived of his exempt IV-D classification and placed in Class I-A, again making him liable for training and service. From the time of his classification in IV-D until his reclassification into I-A he did not change his ministerial status nor discontinue devoting substantially all of his time to the performance of his ministerial work. He thereafter requested a personal appearance which was granted, but the local booard was prejudiced and refused to permit him to offer full evidence of his exemption and denied him a fair hearing, thus abridging his procedural rights to make a complete record before the board of appeal, in violation of the due process clause of the Fifth Amendment to the United States Constitution. He was allowed to file additional affidavits from other ministers showing that he was doing ministerial work both as a pioneer and assistant to the presiding minister of a congregation of Jehovah's witnesses. The day following his personal appearance the local board continued him in Class I-A on August 31, 1944. Accordingly on September 8, 1944, he filed a written appeal to the board of appeal. Thereafter he took his preinduction physical examination on September 11, 1944, and was duly accepted and on said date mailed a certificate of fitness showing he was physically fit, acceptable for general military service. On October 3, 1944, the local board mailed him Notice of Classification show-

ing the board of appeal had continued him in Class I-A, making him liable for training and service.

6. Thereafter, in October 1944, the Director of Selective Service declined to make an appeal to the President in behalf of petitioner. Such action by the Director did not constitute a determination by him that petitioner was not a minister of religion, but was a refusal to exercise discretion under Section 628.1 of the Selective Service Regulations. Petitioner was mailed Order to Report for Induction on October 20, 1944, directing him to report on November 9, 1944. Petitioner reported on November 9, 1944, at the induction station as directed because he wanted to go as far as he could in the process of induction without joining the armed forces, to protect his rights, because he was a "minister of religion", exempt from training and service, and the boards had unlawfully denied his claim and illegally ordered him to report for induction, contrary to the Act and Regulations.

7. At the Local Board 254, Jackson Heights, New York, petitioner appeared and answered the roll call at 9:00 A.M. on November 9, 1944. He left with the other inductees for the induction station at Grand Central Palace, New York City. He arrived with the other inductees at about 9:15 A.M. Thereafter he entered upon the process of the armed forces and went through all the routine thereof including a physical examination to discover whether his physical condition had changed since the last acceptance and upon such physical examination he was again accepted for training and service by the armed forces. Thereafter petitioner was ordered to submit to induction, which he declined to do, and refused to submit to induction. He was advised he was liable for prosecution in the courts for refusal to so submit and was again asked to submit, which he declined to do. He thereupon was required to sign a statement that he did not submit to induction because he was an ordained minister and as such exempt from military service. There-

upon he was charged with a violation of the Selective Training and Service Act, as amended, by refusing to thus submit to induction.

8. By reason of petitioner having undergone all the necessary physical examinations, having been declared accepted by the armed forces, and complied with all other regulations except the order requiring him to submit to induction, petitioner exhausted all of his administrative remedies and completed the selective process so as to qualify himself for judicial review of the illegality of the action of the draft boards in classifying him as liable for training and service and in denying his claim for exemption as a minister of religion under Section 5 (d) of the Act, and to show that the administrative agency had denied all of his rights of procedural due process to a fair hearing by the board of appeal in that the local board was prejudiced, and at the hearing and personal appearance before the local board, the local board failed to make a full, adequate and complete record in writing of all the evidence offered at said hearing, and for each of the other reasons shown herein.

9. At the time petitioner registered under the Act, at the time he filed his questionnaire, at the time he was classified and when he was ordered to report for induction, as well as at the time of his trial in the district court, he was, and still is, a duly ordained minister of religion, and of Jehovah's witnesses and the Watchtower Bible and Tract Society. Said Society and Jehovah's witnesses are Christian organizations whose sole activity is preaching and disseminating Bible doctrines and conducting organized Bible studies publicly and in the homes of the people through duly authorized representatives who are ordained ministers of the gospel, missionaries and evangelists specially commissioned and trained to do such preaching. They are duly recognized, as aforesaid, by Selective Service National Headquarters and by the United States Govern-

ment as a recognized religious organization under the Selective Training and Service Act of 1940, as amended.

10. Petitioner has consistently submitted full and conclusive evidence that he was and is one of Jehovah's witnesses and, as such, a duly ordained minister of Jehovah God and of the Watchtower Bible and Tract Society, a Christian organization. He submitted proof from other of Jehovah's witnesses with whom he was associated showing they recognized him as performing the duties of an ordained minister. He submitted proof that he is recognized as such minister by the Watchtower Bible and Tract Society. Proof of petitioner's ministerial status was submitted in the questionnaire, supported by a copy of his certificate of ordination from the Society, by affidavits from many other persons recognizing and corroborating his ministerial status, and by other documents, all of which proof are now on file and in the possession of said local board with which petitioner is registered. At all times petitioner has devoted more hours to actual preaching and teaching of the gospel of Jesus Christ in the manner required by Jehovah's witnesses than are devoted by the ordinary clergymen of orthodox religions. At the time of receiving his classification of I-A he was devoting substantially his full time to such preaching activity as a "pioneer" minister of Jehovah's witnesses. All the foregoing facts were duly and timely made known to the Selective Service System as a basis for consideration of his classification, and such facts are undisputed and uncontroverted.

11. The said draft boards that considered petitioner's case refused and failed to consider the foregoing proof that your petitioner submitted, showing that he was an ordained minister of religion within the meaning of Section 5 (d) of the Act, and thereby—

(a) said boards acted contrary to and in violation of Section 622.44 of the Selective Service Regulations promulgated by the President of the United States,

concerning classification of regular and duly ordained ministers of religion;

(b) said boards ignored and disregarded and failed to consider or apply Opinion No. 14 of National Headquarters of Selective Service concerning Jehovah's witnesses, under which petitioner would have been declared to be a duly ordained minister of religion;

(c) said boards discriminated against petitioner contrary to the due process clause of the Fifth Amendment to the United States Constitution;

(d) said administrative agency deprived petitioner of his procedural rights of due process to a full and fair hearing by a fair and unprejudiced board contrary to the due process clause of the Fifth Amendment to the United States Constitution.

12. Your petitioner asserts that there was no evidence, oral, documentary or written, before the draft boards which disputed his claim and evidence concerning his status as a minister of religion. The boards did not claim that petitioner was an impostor or fictitiously or falsely claimed that he was a minister of the Watchtower Bible and Tract Society and one of Jehovah's witnesses, and a recognized representative of said Society. There was no evidence in any form before the boards which showed that petitioner was not a minister of religion. By reason of the foregoing, the said draft boards did not have authority or jurisdiction under the statute to order him to report for training and service under the Act because, upon the facts and evidence before the boards, petitioner was exempt from all training and service. The said boards had no discretion or authority under the law to reject petitioner's claim that he was an "ordained minister of religion" and, as such, statutorily exempt, which said claim in effect constituted a special plea to the jurisdiction of the said draft boards. The acts of the agency were ultra [redacted]

13. The foregoing acts and conduct of the local board in rejecting petitioner's claim for exemption when there was no evidence in the file contrary to such claim, constituted gross error specifically in violation of Sections 623.2, 627.13 and 622.44 of the Regulations and Section 5 (d) of the Act. Furthermore, such acts and conduct of said local board constituted prima facie unlawful discrimination against petitioner and in favor of clergymen of orthodox religions because the undisputed proof showed that petitioner spent more time actually preaching the gospel than the orthodox clergy. The acts and conduct of said boards in rejecting petitioner's claim for exemption and ordering him to report for induction constituted and is a denial of his liberty and fundamental rights without due process of law, contrary to the Fifth Amendment to the United States Constitution.

14. Subsequent to the foregoing illegal action of the boards, the grand jury of the United States District Court for the Southern District of New York returned an indictment against petitioner (attached to this petition as EXHIBIT B) charging him with an alleged violation of section 311 of Title 50 of the United States Code for having failed to submit to induction as ordered by said local board and the armed forces. The indictment was filed in said court. Petitioner pleaded "not guilty". On May 2, 1945, the case against petitioner was called for trial to a jury before United States District Judge Mortimer S. Byers of said court. Upon the trial of said cause petitioner's entire draft board file was offered in evidence, which, with the exception of the order to report for preinduction physical examination and order to report for induction, showed on their face that petitioner was a minister of religion and as such claimed statutory exemption from training and service and that he had been denied his rights contrary to the due process clause of the Fifth Amendment. Upon the trial he sought to offer evidence, including petitioner's testi-

mony in his own behalf, showing that he was an ordained minister and that such fact was properly called to the attention of his local board as provided by the Regulations. In each instance, the judge ruled out all of such above evidence, holding that it was not material in that petitioner could not show the illegality of said boards' action in defense to the indictment. When the trial judge charged the jury as to the law of the case, he specifically denied the jury the right to consider whether petitioner was exempt from training and service because an ordained minister of religion and whether the agency had violated the law, the Constitution and petitioner's procedural rights. He told the jury that such was a matter solely for the determination of the draft boards and the action of such boards was unimpeachable in the criminal proceedings and conclusive upon the court and jury, and the jury could not and should not consider such issues or defenses to the indictment. The judge informed the jury that the only question was whether or not petitioner failed to submit to induction. The judge further instructed the jury that they could not and would not determine whether the draft boards illegally and unlawfully rejected and ignored petitioner's claim for exemption from military training and service. To each action of the court in refusing to allow him to make said defense the petitioner objected and excepted and claimed that it was a violation of his constitutional right to deny him the right to make the defense tendered and requested which constitutional objections have been restated in his petition.

15. The acts and conduct of the trial judge involving the said indictment against petitioner violated the fundamental rights of petitioner. The aforesaid conduct of the trial judge was an outright denial of the right of trial by jury upon the defenses under the Act, and was a transfer of judicial powers and functions of the trial judge and trial court from the United States District Court to the

draft boards. The submission of the case to the jury on the one question of whether petitioner failed to submit to induction as ordered by the local board, and the refusal of all other questions was tantamount to putting petitioner through a "trial by ordeal" under a bill of attainder, contrary to the Constitution before the jury in the district court, because the real issue of duty under the Act was ignored and suppressed by the court. The above described conduct of the trial judge constituted a violation of Clause 3 in Section 9 of Article I of the Constitution as well as Article III thereof, and Amendments 1 and 6 thereto, guaranteeing the procedural rights of a defendant charged with crime; and thereby petitioner was denied his liberty and rights without due process of law.

16. Petitioner would show that after having been adjudged guilty upon the verdict of the jury on May 2, 1945, as charged in the indictment, he was sentenced on May 7, 1945, by the court and ordered to be confined for a period of three and one-half (3½) years in an institution designated by the Attorney General. Thereafter petitioner was incarcerated.

17. The manner in which the draft boards have construed section 5 (d) of the Act, in denying petitioner's claim for exemption, violates the Fifth Amendment to the Constitution and it is void as construed and applied. The Act and Regulations have been construed so as to impose on a minister of religion exempt from duty an obligation to comply with illegal orders and thus said Regulations and Section 11 of the Act, containing the criminal sanctions clause, are void because in violation of Clause 3 in Section 9 of Article I of the United States Constitution and the Fifth and Sixth Amendments thereto. The courts and the boards have thus made the Act unconstitutional.

18. By reason of the foregoing, the entire proceedings against petitioner, including the return of the indictment,

judgment and commitment, are illegal, a nullity and void, and just as though no proceedings ever were had against petitioner. Petitioner being now more fully informed of his legal rights, believes that he has been denied his legal rights, contrary to the United States Constitution, in such a manner as to make the proceedings a nullity and subject to review and collateral attack, upon an application for writ of habeas corpus.

19. The court is requested to review, in addition to or exclusive of the issue of exemption from duty, the evidence before the boards as to the classification made and/or as to petitioner's status under the Act, petitioner asserting that (a) there was no evidence before the boards to support their findings, classifications and acts; (b) in arriving at their determination said boards acted arbitrarily and capriciously and in utter disregard of petitioners rights; (c) said boards grossly and clearly abused their discretion, illegally misused their powers and disregarded the evidence submitted by petitioner showing he was a "minister of religion", exempt from training and service; (d) said boards acted unwarrantedly on the substantive facts before them concerning petitioner's ministerial status; (d) the findings of said boards do not have a basis in substantive evidence and are contrary to the undisputed evidence showing petitioner to be a minister of religion; (f) said boards were prejudiced against petitioner and discriminated against him because of his creed and faith, and otherwise departed from the applicable rules of procedural law and administrative regulations. That each of the foregoing grounds constitutes a denial of petitioner's rights, liberty and privileges without due process of law, contrary to the Fifth Amendment to the United States Constitution.

20. Petitioner desires to make good by proof and evidence the allegations hereinabove shown concerning illegal conduct of said boards and the said trial judge in the

district court. This Court is requested to cause to be issued subpoena duces tecum unto the clerks of said tribunals to produce all records and evidence in all proceedings had before said tribunals concerning petitioner for the purpose of a review by this Court at the time of the hearing of this petition. Petitioner further says that a writ of certiorari should forthwith issue to said United States District Court for the Southern District of New York and to said local board and its clerk and chairman directing them and each of them to certify to this Court all said proceedings which took place before said tribunals concerning the status of said petitioner under the Selective Training and Service Act of 1940, as amended, and Regulations thereunder.

WHEREFORE, petitioner prays that the writ of habeas corpus be issued by this Court, or, in the alternative, a show cause order be issued, directed to said respondent, his deputies or agents and successors in office, and each of them, to bring and have the body of JOHN MYRON KULICK in court at a time to be fixed by this Court, together with the true cause of the detention of said petitioner, to the end that due inquiry can be had as to the foregoing allegations concerning the illegality of petitioner's restraint and detention and that, upon a hearing hereof, the judgment of conviction and the commitment be declared null and void and that petitioner be discharged and restored to his liberty together with all rights as a citizen of the United States; and your petitioner further prays that a writ of certiorari issue, at the time the writ of habeas corpus or the notice of show cause order issues upon this petition, directed to the clerk and chairman of petitioner's Local Board No. 254, Queens County, 86-18 Northern Boulevard, Jackson Heights, New York, and to the clerk of the United States District Court wherein petitioner was convicted and sentenced to the custody of respondent, di-

recting them and each of them to certify to this Court all the proceedings which took place before said boards or said court, together with all papers, affidavits, motions, judgments, orders, evidence, testimony and other matters pertaining to all the proceedings which took place before said boards or said court in the matter of said petitioner under the Selective Training and Service Act of 1940, as amended, resulting in the arrest or detention of petitioner for the alleged violation of the Act, Regulations, or order to report for and submit to induction, to the end that this Court may proceed to determine the facts of this case in regard to your petitioner's restraint and detention, and thereupon make and enter such order herein as to the Court seems proper. Petitioner prays for such other and further relief to which he may show himself justly entitled.

Hayden C. Covington
HAYDEN C. COVINGTON
117 Adams Street
Brooklyn 1, New York

CARL A. MEARS
Chamber of Commerce Building
185 Church Street
New Haven 10, Connecticut
Attorneys for Petitioner

STATE OF CONNECTICUT, County of Fairfield, ss:

JOHN MYRON KULICK, being sworn, says that he is the petitioner herein and employed counsel to prosecute the petition for writ of habeas corpus; that he duly authorized said attorney to bring this proceeding and that he has read the foregoing petition and that the allegations of fact contained therein are true and correct.

John M. Kulick
JOHN MYRON KULICK

Subscribed and sworn before me this
27th day of February, 1946:

Kenneth E. Nieman
A. W.
"Authorized by the Act of February
11, 1938, to administer Oaths."

[Seal]

STATE OF NEW YORK, County of Kings, ss:

Hayden C. Covington, being sworn, says that he is a member of the bar of the State of New York and of the Second Circuit Court of Appeals; that he was requested by the petitioner herein, John Myron Kulick, to institute habeas corpus proceeding to obtain release of said petitioner from the custody of the Warden of said Federal Correctional Institution; that affiant is duly authorized to institute this proceeding in behalf of said petitioner; that affiant has read the foregoing petition for writ of habeas corpus and says that all the allegations of fact contained therein are true and correct.

Hayden C. Covington
HAYDEN C. COVINGTON

Subscribed and sworn to before me this
26th day of February 1946:

William K. Jackson
William K. Jackson
NOTARY PUBLIC Kings County
Kings Co. Clk's No. 97, Reg. No. 62-J7
Commission Expires March 30, 1947

[Seal]

EXHIBIT A

Judgment and Commitment

[Filed May 7, 1945]

DISTRICT COURT OF THE UNITED STATES
Southern District of New York

UNITED STATES OF AMERICA
v.
JOHN MYRON KULICK

C. 119/62

Violation of U. S. C. Title 50, Sec. 311. Failure to submit to induction into the Armed Forces of the U. S.

On this 7th day of May 1945, upon the proceedings heretofore had herein and on motion of the United States Attorney, IT IS BY THE COURT

ORDERED AND ADJUDGED that the defendant be hereby committed to the custody of the Attorney General or his authorized representative for imprisonment in an institution to be designated by the Attorney General or his authorized representative for the period of THREE AND ONE HALF YEARS.

IT IS FURTHER ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

[signed] MORTIMER W. BYERS
United States District Judge

EXHIBIT B

Indictment

IN THE DISTRICT COURT OF THE UNITED STATES
For the Southern District of New York

Southern District of New York, ss: The Grand Jurors for the United States of America, duly empaneled and sworn in the District Court of the United States for the Southern District of New York, and inquiring for that District, upon their oath present:

That heretofore, to wit, on or about the 9th day of November, 1944, at the Southern District of New York and within the jurisdiction of this Court,

JOHN MYRON KULICK,

the defendant herein, did unlawfully and knowingly fail and neglect to perform a duty required of him under and in execution of the Selective Training and Service Act of 1940, and the rules and regulations duly made pursuant thereto; that is to say, that at the time and place aforesaid, the defendant herein was required, pursuant to the Selective Training and Service Act of 1940, and the rules and regulations duly made pursuant thereto, to submit to induction into the Armed Forces of the United States; that said defendant unlawfully and knowingly did fail and neglect to submit to said induction into the Armed Forces; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 50, Section 311, United States Code).

JOHN F. X. McGOHEY
United States Attorney

Order Granting Writ of Habeas Corpus and Setting Hearing

The duly verified petition of JOHN MYRON KULICK for a writ of habeas corpus was presented to me in chambers at New Haven, Connecticut, on the date shown below, and was read and considered by me. Upon the petition it is

ORDERED AND DECREED that the petition be filed by the clerk upon payment of the required deposit for costs; and it is further

ORDERED AND DECREED that the writ of habeas corpus be granted and the clerk of this Court shall issue a writ to the Marshal of this Court to be served upon M. L. Kennedy, Warden of the Federal Correctional Institution at Danbury, Connecticut, commanding him to appear before Honorable Carroll C. Hincks, United States District Judge and produce the body of JOHN MYRON KULICK at the courtroom of the United States District Court in the United States Court House at New Haven, Connecticut, on the 13th day of March, A. D. 1946, at 10:30 o'clock in the forenoon on such day, at which time and place the parties shall be heard as to whether or not the petitioner, JOHN MYRON KULICK, shall be discharged, or whether the writ of habeas corpus shall be discharged.

Done at New Haven, Connecticut, on this 27th day of February, 1946.

C. C. Hincks

United States District Judge

Writ of Habeas Corpus

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To M. L. Kennedy, Warden Federal Correctional Institution, Danbury, Connecticut—GREETING:

YOU ARE HEREBY COMMANDED, that the body of John Myron Kulick by you restrained of his liberty, as it is said detained by whatsoever names the said John Myron Kulick may be detained, together with the day and cause of being taken and detained, you have before the Honorable Carroll C. Hincks, Judge of the United States District Court in and for the District of Connecticut, at the court room of said Court, in the City of New Haven at 10:30 o'clock A. m., on the 13th day of March, 1946, then and there to do, submit to and receive whatsoever the said Judge shall then and there consider in that behalf; and have you then and there this writ.

WITNESS the Honorable CARROLL C. HINCKS

United States District Judge at New Haven this 27th day of February, A. D. 1946.

(Seal) C. E. PICKETT *Clerk.*

No. 1671 Civil

Returnable March 13, 1946.

New Haven, Conn.
February 27, 1946

United States of America }
District of Connecticut } ss

I hereby certify and return that pursuant to the within order I this day served the Warden of the Federal Correctional Institution at Danbury, Conn., by mailing three certified copies of this order and three certified copies of the writ of habeas corpus directed to M. L. Kennedy, Warden, Federal Correctional Institution, Danbury, Conn., together with three copies of petition for writ of habeas corpus.

Bernard Fitch, U. S. Marshal
Attest:

Bernard Fitch

No Expense

Return of Respondent M. L. Kennedy

[Filed March 7, 1946]

The Respondent herein, M. L. KENNEDY, Warden, Federal Correctional Institution, Danbury, Connecticut, appearing herein by Adrian W. Maher, United States Attorney, and Valentine J. Sacco, Assistant United States Attorney, in and for the District of Connecticut, hereby produces the body of the Petitioner in compliance with the Order of this Court, and in answer to the Writ of Habeas Corpus issued by this Honorable Court, respectfully alleges as follows:

1. So much of Paragraph 1 of the Petition as alleges that Respondent is a citizen of the United States and resident of the State of Connecticut is admitted. The Respondent has no knowledge as to the remainder of said paragraph and leaves Petitioner to his proof thereof.

2. All of the allegations of Paragraphs 2 and 3 of the Petition are admitted, exept those portions which allege that Petitioner is "illegally deprived of his liberty" and "illegally imprisoned" in the Federal Correctional Institution at Danbury, Connecticut.

3. Paragraphs 4, 8, 11, 13, 15, 17 and 18 of the Petition are denied.

4. As to Paragraphs 5, 6, 7, 9, 10 and 14 of the Petition, the Respondent has no knowledge and leaves the Petitioner to his proof thereof.

5. Respondent has no knowledge concerning the allegations of Paragraph 12 of the Petition beginning with the words "Your Petitioner asserts" and ending with the words "minister of religion" (line 10), and leaves Petitioner to his proof thereof. The remainder of said paragraph is denied.

6. Paragraph 16 of the Petition is admitted.

It is respectfully alleged that upon its face the Writ of

Habeas Corpus is insufficient in law and that the Writ thereof should be quashed because:

a. The Petitioner is now imprisoned and deprived of his liberty by Respondent in the Federal Correctional Institution at Danbury, Connecticut, by virtue of a judgment rendered and entered on the 7th day of May, 1945 in the District Court of the United States for the Southern District of New York and a commitment issued on said judgment by a Judge of said United States District Court for the Southern District of New York upon the conviction of the Petitioner for a violation of Title 50, Section 311, U.S.C.A. (A copy of said judgment and commitment is attached to Petition and marked Exhibit "A").

b. The Petition does not allege facts to show that the criminal proceedings which resulted in the Petitioner's conviction and subsequent judgment and commitment thereon were not regular, fair and in compliance with the statute under which Petitioner was indicted and of the law applicable in such case, nor does the Petition allege facts from which this Court can determine that the criminal proceedings were either irregular, unfair or not in compliance with the said statute. (Title 50, Section 311, U.S.C.A.)

c. The Petition does not allege any facts which entitle this Court to review the judgment and commitment of the United States District Court for the Southern District of New York.

d. The Petition does not allege facts which entitle this Court to review the findings and conclusions of Local Board 254 for Queens County, Jackson Heights, New York, which classified Petitioner in Class 1-A and ordered him to report for induction on November 9, 1944.

e. The Petition does not allege that there was no evidence before Local Board 254 for Queens County, Jackson Heights, New York, upon which the Local Board could have

based its findings and conclusions and classification of the Petitioner in Class 1-A.

f. It does not appear in the Petition that the issues sought now to be litigated in this Court have not already been determined by Local Board 254 for Queens County, Jackson Heights, New York, adversely to the Petitioner in proceedings which were regular, fair and in compliance with the statute and regulations applicable thereto.

g. This Court cannot give judicial review to the findings and conclusions of Local Board 254 for Queens County, Jackson Heights, New York, under the Selective Training and Service Act of 1940, which Act makes the findings of the Local Board final and not subject to review.

h. The Petition seeks to accomplish a review of the judgment of the United States District Court for the Southern District of New York, entered on May 7, 1945, which judgment is properly reviewable only by appeal to the Circuit Court of Appeals for the Second Circuit within the statutory period. The statutory period for appeal from the verdict of guilty and the judgment of said Court on said verdict has long since expired and the term of court at which said judgment was entered on May 7, 1945, has likewise expired. Petitioner's failure to perfect his appeal within the statutory period, therefore, bars him from the judicial review of said judgment and conviction.

i. The judgment of the United States District Court for the Southern District of New York sentencing Petitioner to imprisonment cannot be collaterally attacked in this Court by Writ of Habeas Corpus. The alleged denial of a full and fair trial before said United States Court is reviewable only upon direct appeal from the judgment of conviction.

j. The Petitioner has been afforded due process of law in all respects; he was duly indicted by the Grand Jury for the Southern District of New York and charged with a violation of Title 50, Section 311, U.S.C.A.; (a copy of the

indictment is attached to the Petition as Exhibit "B"); the indictment was duly filed in said Court and in due course Petitioner was arraigned and pleaded not guilty; on May 2, 1945 Petitioner was tried to a jury before United States District Judge Mortimer S. Byers of said Court; the jury rendered a verdict of guilty after due consideration and on May 7, 1945 Petitioner was sentenced to be confined for a period of three and one-half years in an institution designated by the Attorney General; Petitioner is presently incarcerated in the Federal Correctional Institution at Danbury, Connecticut, by your Respondent, pursuant to said judgment of the United States District Court for the Southern District of New York. Respondent alleges that all proceedings were constitutional and valid and Petitioner's legal rights were considered and protected at all times; in accordance with the Fifth Amendment to the United States Constitution.

WHEREFORE, Respondent prays that the Writ of Habeas Corpus be quashed and the Petitioner be remanded to the custody of the Respondent for the serving of his sentence, according to law.

Dated at Hartford, Connecticut, this 6th day of March, 1946.

Respondent, M. L. Kennedy
Warden, Federal Correctional Institution
Danbury, Connecticut

Adrian W. Maher
By Adrian W. Maher
United States Attorney

Valentine J. Sacco.
By Valentine J. Sacco
Assistant United States Attorney

Supplemental Return of Respondent M. L. Kennedy

[Filed March 16, 1946]

The Respondent herein, M. L. KENNEDY, Warden, Federal Correctional Institution, Danbury, Connecticut, appearing herein by Adrian W. Maher, United States Attorney, and Valentine J. Sacco, Assistant United States Attorney, in and for the District of Connecticut, hereby files a Supplemental Return in further answer to the Writ of Habeas Corpus issued by this Honorable Court and respectfully alleges as follows:

A. In the event that this Honorable Court rules that the judgment of the United States District Court for the Southern District of New York on May 7, 1945, sentencing Petitioner to imprisonment for a period of three and one-half years in an institution designated by the Attorney General of the United States, is open to collateral attack in this proceeding, even though the statutory period for appeal of such judgment has long since expired, your Respondent hereby alleges and avers that the following are the true facts concerning the Petitioner as revealed in the Selective Service file of Local Board No. 254, located at Jackson Heights, New York. (Said Local Board file will be offered in evidence in the event this Honorable Court rules that the aforementioned judgment is open to collateral attack in this proceeding.)

1. Kulick registerd on June 30, 1942, giving his age as 19.

2. Kulick executed his Selective Service Questionnaire on December 5, 1942. He gave his age as 19. He stated he had four years of elementary school and eight years of high school, and that he had no other schooling. He stated that he worked on radio apparatus from 1941 to 1942. He stated his present occupation was a Jehovah's Witness minister, having been ordained in 1939.

Kulick attached a statement to his questionnaire and

claimed exemption from all service as a minister of religion. He also attached a photostatic copy of a statement from the Watchtower Bible and Tract Society, Incorporated, showing that he had become a "pioneer" on July 1, 1942, the day after he registered.

Kulick did not claim to be a conscientious objector in his questionnaire.

3. By letter dated December 31, 1942, the Local Board was advised that Kulick's name was not on the list of "pioneers".

4. On January 5, 1942, the Local Board placed in Kulick's file a copy of Opinion No. 14 of the Director of Selective Service, as amended November 2, 1942.

5. On February 4, 1943, Kulick wrote a letter to his Local Board calling attention to Opinion 14.

6. On March 29, 1943, the Local Board classified Kulick in Class I-A. (See back of Questionnaire).

7. By letter dated April 3, 1943, Kulick requested a personal appearance before the Local Board.

8. On April 6, 1943, Kulick presented to the Local Board four statements from other Jehovah's Witnesses. One was from Fred Severud, described as a "Company Servant". He said that Kulick went "from house to house with his Bible and information pertaining to the Bible and, also, phonographic Lectures". Another was from E. Chrysomalis, described as a "Unit Servant", saying that Kulick had been a minister from 1939. Another was from William K. Jackson, described as a "fully ordained minister" of Jehovah's Witnesses. He said Kulick became a "pioneer" in 1940. Another was by Leo Buczek, described as a member of the "Bethel Family" of Jehovah's Witnesses and a "Unit Servant". He said Kulick became a minister in 1939.

9. On April 28, 1943, the Local Board classified Kulick in Class IV-D. (See back of Questionnaire).

10. On August 23, 1944, the Local Board received word

from another Local Board that a mother with three sons in the service and a neighbor of Kulick had complained about Kulick's status. It was reported that Kulick spends most of his time around his home, "when he isn't posing at times in uniform". (See memo in file).

11. On August 23, 1944, the Local Board classified Kulick in Class I-A. (See back of Questionnaire).

12. By letter dated August 26, 1944, Kulick requested a personal appearance before the Local Board.

13. On August 30, 1944, Kulick was given a personal appearance before three members of the Local Board and the Government Appeal Agent. He presented his own written statement and also a written statement by Roland E. Davis, described as "Assistant Company Servant". Davis said that Kulick had been a "pioneer" since "early 1941" and "during this time he has spent at least 150 hours each month preaching the gospel of God's Kingdom by calling upon the people with Bibles and Bible helps in the form of books, booklets and recorded talks on Bible subjects." Davis made no mention of any other employment or work by Kulick since "early 1941".

It was brought out at this hearing that Kulick was in fact serving as a photographer's model. The Local Board also had before it the fact that Kulick worked for R.C.A. in 1941 and until June, 1942, when he became liable for service. (See note in file).

14. Following the hearing on August 30, 1944, the Local Board classified Kulick in Class I-A. (See back of Questionnaire). Kulick appealed his classification to the Board of Appeal.

15. On September 8, 1944, Kulick furnished a written statement in support of his appeal.

16. On September 28, 1944, the Board of Appeal classified Kulick in Class I-A by a vote of 4 to 0.

17. On October 11, 1944, Kulick was given a further

hearing by the Local Board, but his classification was not reopened.

18. On October 19, 1944, Kulick wrote to the Director of Selective Service, claiming he had been unjustly classified. However, the Director did not appeal the classification to the President.

19. On November 1, 1944, the Local Board again considered Kulick's claim and decided against reopening his classification.

B. In the event that this Honorable Court rules that said judgment of conviction is open to collateral attack in this proceeding, the full transcript of testimony taken in the criminal trial of the United States v. John Myron Kulick in the District Court for the Southern District of New York on May 2, 1945, will be offered in evidence by the Respondent, and said transcript is hereby made a part of this return by reference.

WHEREFORE, Respondent prays that the writ of habeas corpus be quashed and that the Petitioner be remanded to the custody of the Respondent for the serving of his sentence according to law.

Dated at Hartford, Connecticut, this day of March, 1946.

M. L. KENNEDY, Warden, Federal Correctional Institution, Danbury, Connecticut,

Respondent

By Adrian W. Maher
United States Attorney
By Valentine J. Sacco
Assistant United States Attorney.

Transcript of Hearing on Writ

[EXCERPTS]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT
#1671, Criminal

WRIT OF HABEAS CORPUS

March 2[illegible]

JOHN MYRON [illegible] *Petitioner*

v.

M. L. KENNEDY, WARDEN
Danbury Correctional Institution
Respondent

Before HONORABLE CARROLL C. HINCKS,
District Judge.

Appearances:
For the Petitioner
HAYDEN COVINGTON, ESQ.
117 Adams Street
Brooklyn, N. Y.

For the Respondent
ADRIAN W. MAHER, ESQ.
U. S. Attorney
VALENTINE J. SACCO, ESQ.
Assistant U. S. Attorney

MR. COVINGTON: If your Honor please, this case presents to the Court the question of whether or not one who has been indicted under the Selective Service Act and charged with the offense of refusing to report for induction—refusal to submit to induction rather—can defend the indictment, and that if the denial of that defense upon trial

is made, whether or not that denial constitutes a denial of due process of law so as to make the judgment and commitment void and subject to collateral attack.

In this case, John Myron Kulick was classified by his Board as liable for training and service. He completed the selective process by reporting at the induction station and undergoing the physical examination at the Army Forces Induction Station, and at the close of that refusing to submit to induction. He was indicted in the United States District Court for the Southern District of New York, he was tried, and I represented him upon that trial. In defense to the indictment, I contended before the trial judge that this man had completed his administrative remedies and was in a position to challenge the validity of the order that commanded him to submit to induction.

Upon the trial, we offered to prove and show that this man was exempt from all training and service as a minister of religion, and upon the trial all the Draft Board records were offered, a number of which were received, a number of which were excluded. But in any event, when the case was submitted to the jury, the trial judge over objection and exception, in effect struck out all the evidence in reference to the Draft Board's classification and the validity of the order, and confined the issue to the question of whether or not this man actually submitted to induction, which the undisputed evidence showed that he had not. It was necessary for him to go to that point and refuse to submit in order to complete his remedies so as to qualify to make his defense. Exceptions were taken to these rulings on the ground that there was a denial of his right to due process of law and certain requested instructions were submitted to the Court raising these various issues and they likewise were refused and exceptions to those refusals were taken.

Mr. Kulick was then sentenced by Judge Byers to three years in the Federal Institution. He was committed at Danbury. No appeal was taken from that judgment of the

conviction. We take the position now that the fact alleged in the petition, no cause of action has been shown, and that if we were successful in proving the allegations made, that this man should be discharged from custody on the ground that Judge Byers denied him a fair trial and denied him the right to a full and fair hearing, and that Judge Byers' conduct was such—of such a nature as to oust the District Court of judisdiction to impose sentence; that the judgment and conviction is void and subject to collateral attack, and that these questions thus presented upon the petition and the Writ of Habeas Corpus are not such questions that are confined to appeal but that they can be inquired into and considered by the Court sitting as a Habeas Corpus Court to determine the validity of this conviction and judgment.

MR. SACCO: The Government takes this position, your Honor, as set out in the Government's return for the respondent. This defendant is legally restrained of his liberty by virtue, as Mr. Covington has pointed out, of a judgment of conviction of the Southern District of New York and a commitment based upon that judgment. The term that he was sentenced to was three and a half years—

MR. COVINGTON: That is not so. Three years.

MR. SACCO: Three years, as Mr. Covington has pointed out. This judgment of conviction was entered, as I stated, in the Southern District of New York, on May 7, 1945, and on the commitment Mr. Kulick was incarcerated in the Danbury Federal Correctional Institution where he is at the present.

Now, behind that judgment and behind that conviction, the Government claims that all the proceedings were valid, that this was a valid and true indictment returned by the Grand Jury for the Southern District; that on presentation of this defendant in court where he was represented by counsel, there was a plea entered, a plea of Not Guilty, that a trial followed, that a jury was impanelled, that he

was represented by counsel at each and every stage of the proceedings, that a full trial and a fair hearing was held. The jury verdict of Guilty was rendered, and on that verdict of Guilty the judge duly imposed sentence and a commitment was issued.

Now, the Government in its first return takes the position that this judgment of the Southern District Court of New York is not open to collateral attack in these proceedings by Habeas Corpus for this reason, and I believe it to be a sound reason: By Mr. Covington's admission, no appeal was taken from the judgment of conviction in the Southern District, therefore petitioner through his counsel has slept on those appeal rights. In fact, he has waived them by not taking that appeal within the statutory period. Having done so he cannot now at a later time come in by Habeas Corpus and attempt to substitute the Writ of Habeas Corpus for a Writ of Error or for an appeal. The Statutory period of appeal, the Supreme Court has decided time and time again—

THE COURT: I don't believe that there is any dispute about that, Mr. Sacco. If all that were involved was a claim of error in the trial judge, I don't believe that Mr. Covington, as I understood him, that he would reach that error in a writ. I don't think that you are at issue there. As I understood his presentation, he claimed that there was such a denial of due process that the trial court was without jurisdiction. Isn't that the only issue?

MR. COVINGTON: That is the only issue presented here.

THE COURT: So I don't think you need to argue the other point.

MR. SACCO: Well, the reason I mentioned it, your Honor is this: That we are at issue on the interpretation of what is denial of due process. Now, Mr. Covington has made some statement as to what has gone on in the South-

ern District of New York. We are prepared here to make a full record for your Honor's consideration.

MR. COVINGTON: Why don't you do that now? I might say this, your Honor, that although the prisoner is here there is nothing that he can testify to that can be added to the record, and, therefore I will consent to the introduction of the transcript of the proceedings as well as the exhibits thereto that Mr. Sacco has.

MR. SACCO: Very well.

MR. COVINGTON: And let that be the record upon which this Writ can be disposed of.

THE COURT: Will you describe a little more fully what Mr. Covington refers to as the transcript of the proceedings.

MR. SACCO: Yes, your Honor.

What Mr. Covington refers to is the transcript of the testimony of the trial which was held in the Southern District of New York on May 2nd and 3rd, and the proceedings relative to sentence on May 7th, 1945. The Government has the stenographer's minutes, the full transcript of the testimony, and is prepared to offer them in evidence.

I do, however, before being shut off by Mr. Covington, wish to make the Government's position clear on the record, and that is this: We do believe that what Mr. Covington is seeking to attack is not a procedural due process error, and it is not sufficient for Mr. Covington to get up in this courtroom and say, "Well, what Judge Byers did below is a violation of due process." I think what Judge Byers did below, the Government's position is that it is a procedural error at best, and the transcript of the testimony which is at best—which is being offered and will be before your Honor, is the best evidence as to whether or not it was due process error or a procedural error which should have been taken advantage of by an appeal. But because the Government is only too glad to submit this case on its merit, and because the Government feels and we think the record

supports us that this petitioner was offered a full and fair hearing and a fair trial and hearing in the court below, we want to have the full record before your Honor, and we are offering this transcript of the testimony.

(The transcript referred to was received in evidence and marked as Exhibit 1.)

As I get Mr. Covington's position, and I think the analogy to a pyramid is most apt, he, by successive stages of constitutional attack finally gets down to the foot of the pyramid, and that is the Judge's Charge to the jury. He first says the petitioner is illegally restrained by the commitment. Well then, behind the commitment is the judgment. He says that judgment is invalid, and then the trial is invalid, or behind the trial are certain offers of evidence in the conduct of the hearing. He says that is invalid.

Now, we are prepared to present to the Court, and as a part of the record here, the full Selective Service File of this petitioner, which contains all of the documents which were before the Local Board for the determination and the classification of this petitioner. Because, as Mr. Covington's petition sets out, this Local Board acted illegally. Well, we are prepared to show by the admission of this full and complete file which contains a complete transcript of all the proceedings, that they acted fairly, judicially, and gave this man many hearings in which he had personal appearances; that he took an appeal to the Appeal Board; that the Appeal Board by a 4-0 vote sustained the Local Board; that it received all the documents he submitted, and then in addition to that, as the transcript of evidence will show, Mr. Covington, upon trial of this case offered in evidence all the pertinent documents from this Selective Service File, and he said some were admitted and some were excluded. Well, by my computation Exhibit A through O were admitted, with the exception of only document C which is some letter which was submitted for

identification and then it was agreed by both Mr. Covington and the Assistant United States Attorney who tried the case that the exhibit be excluded. So I think it should be clear in the record that all of the documents which were offered by Mr. Covington were admitted in evidence from this Selective Service File, and were in fact in evidence before the jury in his trial. I will offer the Selective Service File, Mr. Covington, as Exhibit 2.

MR. COVINGTON: I would have no objection. Is it all there?

MR. SACCO: Well, I am offering it to you.

MR. COVINGTON: Well, let me take a look at it first. Well, we have no objection.

THE COURT: It may be received.

(The file referred to was received in evidence and marked as Exhibit 2.)

MR. SACCO: The Government, therefore, wishes to submit this case and get the whole case with its merits before your Honor. Our position, as I stated in the supplemental return, is that we do not have here a due process error but a procedural error in the erroneous charge. Our claim is that that should have been taken care of by appeal within the statutory period; that if Mr. Covington had followed the steps of counsel in the case of United States vs. *Estep* and *United States* vs. *Smith* that he could have obtained a reversal either by the Circuit Court of Appeals or the Supreme Court of the United States. Having failed to do so, he cannot convert this Writ of Habeas Corpus into a Writ of Error, but because we are confident of our position on the merits we are submitting the transcript and the full Selective Service File.

Briefly, I would like to point out that in our supplemental return the Government makes return to the effect that if your Honor feels that there is ground for a collateral attack and that you should go into merits of the case, we have set out a synopsis of the happenings before the Local

Board. We have shown in the supplemental return the classifications which were received by this petitioner. We have shown that he claimed that he was a duly ordained minister of religion at the age of nineteen. In fact, he claimed that his occupation as a Jehovah's Witness Minister began in 1939 when he was only sixteen years of age. He has shown that he submitted documents which were considered by his Local Board, and that on March 29th, '43 he received a 1-A classification. He then requested personal appearance before the board, submitted affidavits, and as a result of that personal appearance and affidavits he was given a 4-D classification.

Due to complaints which were received by the local board, and the complaint is in the file, the local board then learned that Mr. Kulick rather than spending his full time as a Jehovah's Witness and as a minister, was actually employed as a model. He was therefore brought before the local board, or he was first given a 1-A classification, and then three days later he was given another personal appearance before his local board, and at that hearing it was brought out that he was engaged in this occupation as a model, and it was as a result of that testimony that the local board continued him in 1-A classification.

He took an appeal from that 1-A classification and the appeal board upheld the finding of the local board, continued him in 1-A classification by 4-0.

In November of 1944 he was then given his order to report for induction. He did so report. He got to the induction station, went through the routine physical examination, and was found to be acceptable. He then came to the last point of the induction ceremony which was the taking forward to be formally inducted when he refused to take that step and refused to submit to induction, and for that refusal he was duly indicted, tried, convicted, and sentenced.

Now, we are content as I stated before to submit this local board file and the transcript of testimony to show

that he in fact had all his constitutional rights. In fact, they were zealously guarded at every step, considered his personal appearance before the board; he was heard on two occasions, an appeal was taken, and he was given more than his full share of constitutional due process hearing.

Now, we come to the trial. As I said before, Mr. Covington submitted all the documents. What he takes issue with is Judge Byers' charge to the jury. Well, at the time that Judge Byers made that charge to the jury, what Judge Byers charged was good law. The Supreme Court had not yet decided the Estep Case which I will go into in a minute. Therefore, so far as Judge Byers' charge is concerned, he charged the jury on the state of the law at that present point. Now, Mr. Covington, with the help of hindsight and with the help of the late Supreme Court decision, is coming into this Court and saying that no only was the trial unfair but that Judge Byers ousted hi nself of jurisdiction by an erroneous charge to the jury, and I ask Mr. Covington to submit one case to your Honor where an erroneous charge to the jury can be held to oust the court of jurisdiction. That to me is a far-fetched proposition, and it is easy to come in here and say that such and such is a constitutional violation and a due process violation, and open to collateral attack. There was no deprivation of his constitutional rights insofar as I can see.

In his brief, Mr. Covington points out various cases where the Supreme Court has on Habeas Corpus gone outside the record and reached in and said that the Writ of Habeas Corpus will attack certain error which were not taken advantage of in the appeal, but the mere listing of that type of error is sufficient to show that it doesn't reach the case at bar. The cases that Mr. Covington cites are cases where there are denial of plea of former jeopardy, erroneous confession, a domination of trial by mob violence, a trial by information instead of by indictment of a felony, and denial of trial by jury, and illegally forcing and ob-

taining of trial by jury, and illegally forcing and obtaining a plea of Guilty, and certainly Mr. Covington has not a claim that will in any way be comparable to the charge here.

* * * *

In addition to those two exhibits, the Government would also like to offer in evidence the 1943 year book of Jehovah's Witnesses—

MR. COVINGTON: I have no objection.

(The book referred to was received in evidence and marked as Exhibit 3.)

MR. SACCO: The purpose of submitting that in evidence is this: The Selective Service Rules and Regulations provide that the local board and appeal board can consider with reference to any one case documents of general note and general importance that refer to the particular case at hand. We claim that this is relevant on the ground that the pioneers so-called in the field of Jehovah's Witnesses are listed in this book, and among that list of pioneers the name of John Myron Kulick the petitioner does not appear. In addition to that in the pamphlet Consolation which is a part of the Selective Service File also has a list of pioneers, and the Bethel Family and other original group of Jehovah's Witnesses, and Mr. Kulick's name does not appear there.

It is also the Government's contention that the petitioner is legally imprisoned and given a fair and full trial and duly convicted, and stands incarcerated today on a valid commitment, and that your Honor should discharge the Writ of Habeas Corpus and remand him to the custody of the Warden.

* * * *

MR. SACCO: May I say just one word. I think Mr. Covington is in error and we may as well correct him for the record when he stated that Mr. Kulick had terminated

his position with General Electric, RCA, three or four months prior to registration. I believe the file will show that he worked for RCA or General Electric, down to June, 1942, and that he in fact registered with Selective Service in June the same month.

MR. COVINGTON: That's right. He told them some months before. He informed the General Electric that he was going to quit but he actually didn't quit until one month before he registered. That is correct, and I am sorry for that; it was a slip of the tongue.

• • •

I want to read this transcript to you and I want to get this copy of these exceptions that I took to Judge Byers charge and put it in this record because it should have been in this transcript:

"MR. COVINGTON: May I have the privilege of making my exceptions in the absence of the jury?

THE COURT: Just write them out and I will read them." Then I stated I would like to state them orally but not in the presence of the jury. "I would like to have you write them out," the Court said. My notes on the record defendant's request to charge 1 to 44 has been examined and declined, so I would like to see if I can't find those written exceptions that are mentioned here and file them with you because I objected to this charge on the ground that we were denied due process of law, the way he submitted the case to the jury.

THE COURT: If you think they are material evidence at this hearing, why aren't they here, Mr. Covington?

MR. COVINGTON: Well, they told me that they were going to have the transcript of the testimony here; I mean all the proceedings, and I thought my exceptions would be in the transcript like they are in every transcript, but I examined them and found they are not. For the first time I have had an opportunity to see it.

THE COURT: Is there any objection then in keeping the record open, say for a week, to enable Mr. Covington to file his requests?

MR. SACCO: No, your Honor, the Government will be glad.

THE COURT: Will a week suffice for your purpose?

MR. COVINGTON: That will be fine.

THE COURT: Will it be agreeable to waive further attendance of counsel and agree that a certified copy may be mailed direct to the clerk of this Court supplementing the transcript?

MR. SACCO: Yes, your Honor. Except that on behalf of the Government I would like to see those.

MR. COVINGTON: I will mail you a copy of them and then mail it to the clerk directly.

* * *

MR. SACCO: There is one thing further that should be stated for the record. When you refer to the striking out of exhibits by Judge Byers, my reading of the record fails to reveal any formal striking out.

MR. COVINGTON: There was no formal striking. My point was that the effect of the Judge's order was to strike all that evidence out from the record because he refused to let the jury consider it.

MR. SACCO: No formal striking?

MR. COVINGTON: No formal striking, no.

THE COURT: I think, Mr. Sacco, if you will agree where the dividing line is between a mere error and what Mr. Covington calls a vital lack of due process, it will be helpful.

* * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

No. 1671, Civil

JOHN MYRON KULICK, Petitioner
vs.
M. L. KENNEDY, WARDEN

Danbury Correctional Institution, Respondent

COUNTY OF NEW HAVEN
City of New Haven
STATE OF CONNECTICUT, ss July 10, 1946

I hereby certify that the within and foregoing is a true and correct transcript of all the oral evidence on the trial of the above entitled cause.

Benjamin R. Sanders
Official Reporter

Stipulation

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 119/62 Criminal

UNITED STATES OF AMERICA
v.
JOHN MYRON KULICK, Defendant

It is hereby stipulated that defendant's attached written exceptions to the court's charge, which were made, considered and ordered filed upon the trial on May 3, 1945, and which were not filed or incorporated in the stenographer's transcript of the proceedings because they were mislaid, may now be filed with the Clerk of the Court and made a part of the record in this case.

Dated April 10, 1946.

John F. X. McGohey
United States Attorney

Hayden C. Covington
Attorney for Defendant

EXCEPTIONS

Exception is taken to that part of the court's charge where, in the beginning of the charge, the court told the jury that it may strike you as idle why a jury is called upon to pass upon a question that is not contested, and containing down to where the court said that if a man does not plead guilty he is entitled to a jury trial on a plea of not guilty, which charge is excepted to because it charges the jury to convict the defendant.

Exception is taken to that portion of the charge where the court stated in substance that many things had been said

in the presentation of the case and "this morning", which were deliberately made to divert you from duties, which charge is excepted to because it is prejudicial to the rights of the defendant and deprives him of the right to representation by counsel and the right to a trial by jury on the issues of whether or not he is guilty.

Exception is taken to that part of the court's charge beginning with the statement made in substance that as the court told you from the outset the jury was not to pass upon or review the action of the draft boards and that the jury were not to pass upon the judgment of the draft boards, and ending with the statement in substance that it is not for you to decide whether the defendant was illegally or improperly classified, treated or dealt with. This portion of the charge is excepted to because it denies the defendant his right to have the jury pass upon whether he had a duty under the Act and whether the board acted illegally, arbitrarily and deprived him of his constitutional rights. That portion of the charge has construed the statute in an unlawful and unconstitutional manner and deprives defendant of his constitutional rights for each of the reasons and in the manner shown in the attached Exhibit A.

Exception is taken to that portion of the charge where the court told the jury it was not to determine whether he was illegally treated but that the jury were to decide only whether the defendant submitted to induction; and to that portion of the charge where the court told the jury that it had been decided by other courts in cases under the Act and in cases involving other persons of this sect that the court and jury could not decide but the one question which was whether the defendant complied with the order for each of the reasons set forth in Exhibit A attached and because this charge deprives him of his right to a trial by a jury upon the particular facts of this case and because other Jehovah's witnesses have been convicted under the Act is entirely immaterial, prejudicial and deprives him

of his right to a fair and full hearing on the issue of his guilt by the jury and thus abridges him of his right of a trial by jury contrary to the Constitution.

Exception is taken to that portion of the court's charge where it is said that, in substance, if an army were to be raised subject to the action of a court and jury in the case of a young man who wants others to do his fighting, etc., and ending with the statement you can understand in what position the United States would be in, which charge is prejudicial and inflammatory, telling the jury that the court is of the opinion that the defendant is a draft evader and wants others to do his fighting, thus instructing the jury to convict the defendant, which deprives the defendant of the right of trial by jury, and it is excepted to for the reasons shown in Exhibit A attached hereto.

Exception is taken to that part of the charge where the court told the jury that it could understand the system of the Selective Service law and why it would be impossible to raise an army if the jury and court could determine whether a man should or should not be inducted into the armed forces under the Act because of each of the foregoing reasons and the grounds stated in Exhibit A, attached hereto.

Exception is taken to that part of the court's charge and the latter part thereof where the court said to the jury that it was no part of your job to decide whether the boards acted illegally, etc., and ending with the statement that the only question for you to decide is whether the defendant failed to submit to induction, which charge deprives the defendant of the right of a trial by jury, instructs the jury to convict and deprives the defendant of a judicial trial of the issue of whether he has no duty because exempt and not liable under the Act and because it unduly limits the issue and also on the grounds shown in Appendix A attached hereto.

Exception is taken to that part of the court's charge

where he discusses the defendant's testimony and says that upon the defendant's testimony he admitted he willfully and unlawfully failed to report and there was therefore very little if anything to decide which is an instruction to find the defendant guilty, denies him of the right of trial by jury, and is an invasion of the province of the jury in a criminal case.

Defendant objects and excepts to the charge as a whole because it fails to charge as requested in the Defendant's Requested Instructions Nos. 1 to 29, inclusive.

EXHIBIT "A"

The criminal sanction clause of section 11 of the Selective Training and Service Act of 1940, and regulations thereunder, requiring defendant to comply with the order to submit to induction into the Armed Forces of the United States, have been construed by the courts so as to require the defendant (who has been examined on a preinduction physical examination and declared acceptable and who has exhausted his administrative remedies by complying with and submitting to the selective process which was completed before the order to report for induction was issued, and who thereafter reports for induction but who refused to submit to induction at the Army Reception Center) as a condition precedent to testing the invalidity of the classification, to submit to induction pursuant to the illegal order upon which the indictment is based, a vain and needless thing or act.

The construction of the Act and Regulations penalizes the defendant for having failed to submit to induction by denying him the right to show that the order is invalid because of defendant's exemption from duty under the Act as a minister of religion, thus making the said Act and Regulations thereunder unconstitutional and void for each of the following reasons, to wit:

(a) They constitute a bill of attainder, contrary to clause 3 in section 9 of Article I of the Federal Constitution.

(b) They transfer and surrender the judicial power of the United States Courts to the draft boards, in the trial of a criminal case, so as to permit said boards to determine the guilt of the defendant, a judicial function, contrary to Article III of the Federal Constitution.

(c) They abridge the right of the defendant to have a judicial trial and deny him the right to prove his innocence; and also his right to be heard in his defense, contrary to the due process clause of the Fifth Amendment to the Federal Constitution.

(d) They deny and abridge the right of the defendant to a trial by jury and the privilege of having a jury pass on whether the defendant owes a duty because exempt and whether he is guilty of failing to perform a duty, contrary to the provisions of the Federal Constitution guaranteeing a trial by jury and to the Sixth Amendment forbidding the denial thereof.

(e) They permit conviction without evidence, and deny the defendant the right of counsel in his defense, contrary to the Fifth and Sixth Amendment to the Federal Constitution.

(f) They permit the draft boards to determine the guilt of defendant who is exempt and could not be found guilty of violating a duty under the Act, and thereby the Act and Regulations are converted into an *ex post facto* law, contrary to Clause 3 in Section 9 of Article I of the Federal Constitution.

Memorandum of Decision

DISTRICT COURT OF THE UNITED STATES
DISTRICT OF CONNECTICUT
No. 1671 Civil

UNITED STATES ex rel.
JOHN MYRON KULICK,
v.
M. L. KENNEDY, Warden

The petitioner herein, after conviction in May, 1945, on a verdict of guilty in the United States District Court for the Southern District of New York, for an alleged violation of the Selective Service Act, was sentenced to serve a term of three and a half years under the custody of the Attorney General. From this judgment no appeal was taken. Being now confined under the authority of that judgment in the Federal Correctional Institution at Danbury in this District, he has addressed a petition for a writ of habeas corpus to this court. The writ issued as prayed and after due return by the warden named as the respondent therein the parties have been fully heard.

The petitioner asserts that contrary to the Constitution he was denied due process of law first by the Selective Service System in connection with his classification and thereafter by the court at the trial which resulted in his conviction; as a result of this claimed denial he contends that the judgment of the court on the authority of which he is now concededly detained was a nullity for lack of requisite jurisdiction, and hence open to collateral attack in this proceeding.

However, the petitioner failed to appeal from said judgment and since concededly all the rulings of the trial court of which petitioner now bitterly complains could have been raised by an appeal seasonably taken, the Govern-

ment contends that the judgment of the New York court is subject neither to attack nor review here. Thus the first question for determination here is whether this court on the pending petition has the power and duty to consider and adjudge whether the judgment of conviction, entered in a sister court, which on its face has all the attributes of a valid judgment is in truth a nullity since dependent upon some violation of the petitioner's constitutional rights.

Where, as here, the trial court had jurisdiction over the subject-matter and over the defendant's person any claim of error appearing in the proceedings—even error involving the denial of a constitutional right—ordinarily can be raised only through the appellate process and a failure to appeal is an effective waiver of the claim. However, a writ of habeas corpus will issue on a petition alleging facts which show that the apparent waiver was induced by fraud, coercion or ignorance of legal rights and if after hearing such allegations are found sufficiently sustained, the apparent waiver will be treated as ineffectual. *Walker* v. *Johnson*, 312 U. S. 275; *Johnson* v. *Zerbst*, 304 U. S. 485; *U. S. ex rel. McCann* v. *Adams*, 320 U. S. 220. In such cases, as also on petitions alleging jurisdictional objections had not been correctly dealt with by a trial court; *Bowen v. Johnston*, 306 U. S. 19, a court in habeas corpus proceedings will after examination afford protection to such rights as may be found infringed.

This, to be sure, is not a case like those just cited, in which an appeal was waived or frustrated because of lack of competent counsel. The petitioner here was represented on his trial by the same counsel who is now vigorously pressing this petition. I hold, however, that the failure to appeal from the judgment of conviction may not be taken as an effective waiver of a constitutional right because the state of the law at the time of the trial was such that not even competent counsel could then have foreseen the utility of an appeal.

This was so because the charge upon which the petitioner was indicted and convicted was not that of having willfully failed to report for induction pursuant to an order of his local board. If such had been the charge, under the doctrine of *Falbo* v. *U. S.*, 320 U. S. 529, decided in January, 1944, the petitioner, on the theory that he had failed to comply with an administrative order valid on its face, would not have been entitled to interpose as a defense the claimed invalidity of the administrative order and not until he had complied with the administrative order would he have been entitled to a review of its validity on habeas corpus proceedings. Here concededly the petitioner, physically at least, had reported for induction but after acceptance by the induction authorities had refused to submit to induction. Thus the case here fell within the scope of the rule of *Estep* v. *United States* and *Smith* v. *United States*, decisions made upon an opinion of the Supreme Court announced in February, 1946. Under this opinion the petitioner who had reported but refused to submit to induction was entitled to defend on the ground that the Selective Service Agencies in classifying him as 1-A, had acted without any foundation of fact, or arbitrarily and capriciously.

At the time of the trial in May, 1945, the rule of *U. S.* v. *Flakowicz*, 146 F. 2d 874, a Second Circuit case in which the defendant there was also represented by petitioner's counsel here, appeared to be controlling and a writ of certiorari from that decision had already been denied. 325 U. S. 851. And, as was pointed out in Mr. Justice Frankfurter's concurring opinion in the *Estep* case, the right to interpose as a defense in a criminal action such as this a claimed denial of due process by the Selective Service Agencies had been overruled by the Courts of Appeal in seven other circuits with more than forty appellate judges concurring. To be sure, petitioner's counsel, who also represented Estep and Smith, had applied for a writ

of certiorari to review the decision of the Circuit Court of Appeals for the Third Circuit reported in 150 F. 2d 768. But it was not until October, 1945, that this writ was granted. Consequently, and especially in view of the earlier denial of certiorari in the *Flakowicz* case, while Kulick's right of appeal was still alive, his counsel, though still persisting in his prosecution of an appeal in the *Estep* case, had had scant ground to believe that an appeal in the Second Circuit would serve any useful purpose whatever.

In this situation, I think the petitioner should not be penalized because his counsel failed to foresee that widely prevalent doctrine apparently firmly settled would be upset and hence failed to appeal in his behalf. I think him entitled now in these proceedings to a judicial ascertainment of his constitutional rights and appropriate relief from any invasion of those rights which may be found.

In this aspect the case here resembles *Bowen* v. *Johnston*, 306 U. S. 19. There the court pointed out that the rule of review only through the appellate process "is not so inflexible that it may not yield to exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent." And it held that a state of existing "uncertainty and confusion with respect to a question whether" certain offenses were triable in the state or federal courts was an "exceptional circumstance" which warranted a relaxation of the rule of review only by appeal (Page 27).

Here, I think, the reversal of doctrine accomplished by the *Estep* opinion was an "exceptional circumstance" which justified resort to remedies now available only on a writ of habeas corpus. Whether under that circumstance some violation of a constitutional right resulted can be determined only if I look behind the judgment. I therefore address myself to that task.

From the petitioner's file with the Selective Service System which in its entirety has been received into the

record here, from the complete transcript of his trial in the New York court which has also been received in evidence here, and from the evidence originally received at the hearing here on the issues raised by the petition for the writ, I make the following

FINDINGS OF FACT

1 The petitioner was born June 17, 1923. After godly upbringing by parents who are members of the sect known as Jehovah's Witnesses and extensive religious training in his childhood under the direction of the Watch Tower Bible and Tract Society which is the legal corporation which underlies the membership of that sect, the petitioner decided in December, 1939, to devote his entire life to the Lord as His witness. At that time, when aged 16, he was baptized and from that time has considered himself as an ordained minister of the sect, not by virtue of any ceremony, ritual, or official appointment as such—of which indeed there was no evidence—but by virtue of his self-dedication and his subsequent acts. He was then in his third year in high school. At the close of that school year he entered upon what he called "full time pioneer activity" for about four months. Under the practice of the sect, a "pioneer" was required to devote a minimum of 150 hours of service monthly to the religious work of the sect.

2. Thereafter, in October 1940, he returned to complete his high school course. At the same time for about a year he attended a private commercial school two evenings a week so he "could apply for a well-paid job". In August 1941, he sought and obtained full-time employment with R.C.A. Communications. This continued until July 3, 1942, requiring his attendance for five to six and a half days per week. To secure this employment he falsely represented (1) that he was two years older than his actual age and (2) that he had been employed for three years by three specified employers. There was, however, no evidence that

these false representations were known to the local board at least until after the petitioner had been finally classified.

3. He registered with local board 254 on June 30, 1942. After the termination of his employment with R.C.A., just after his registration, so far as was shown by the evidence before the local board, he devoted 150 hours monthly to his ministerial work until his arrest.

4. On March 29, 1943, he was classified as 1-A but on April 28, 1943, was reclassified as IV-D. In August 1944, he was reclassified as 1-A. Beginning in August 1943 he had supported himself by serving as a professional model posing in U.S. Army uniform at a minimum compensation of $7.50 per hour. According to the petitioner's testimony given to the trial court, this employment, which continued to the time of his trial, averaged only two hours a week and he so informed the local board. However, a member of the draft board called by the government at the trial in the New York court testified that at a Board hearing accorded the petitioner on August 30, 1944, "We asked him, as I recall, how much time he gave to his ministerial duties and the time he gave and the time he spent in making his livelihood did not jibe, so we concluded that most of his time was spent working as a professional model and very little time given to his duties as a minister." The petitioner's testimony at this hearing of the board was not reduced to writing other than by a minute recorded on his questionnaire which reads: "When registrant appeared it was learned after interrogation that he was an artist model—and has been photographed in military uniform: when further question C. O. (sic) in military uniform his reply was evasive." No corroboration from his commercial employer or from any other source of the contention that the petitioner's employment as a model was restricted to an average of two hours weekly was offered to the draft board, and although in my view the fact is irrelevant for present purposes, it may be noted that no corroborative

evidence on the point was offered to the trial court or to this court at his hearing on the writ. At his trial, he admitted that in November, 1944, he had told an investigating agent that from his employment as a model "at times he could earn $35.00 a week" but denied having said that he had earned such a weekly sum.

5. The petitioner on trial testified that he submitted to the board no affidavits which it refused to receive and that the board received all the evidence that he offered. Indeed at the hearing above referred to the Board received a two-page typed statement by the petitioner relating to his ministerial activities but no writing relating to his commercial activities was offered.

6. After his hearing on August 30, 1944, the petitioner's classification as 1-A was continued and he was duly ordered to report for induction. Thereafter on appeal the Board of Appeal considered his case on the basis of the entire file of the local board and unanimously classified him as 1-A. By written statement appended to his notice of appeal he reviewed the evidence in the file tending to support his contentions and added that he had told the local board "that occasionally I do secular work but that this work did not interfere with my pioneer duties and requirements. In this connection I showed the board that part of the regulations applying to Pioneers, which states that 'they spend all or *substantially* all of their time in dissemination of their beliefs.' The average time that I spend doing this secular work does not exceed 2 hours for the entire week."

7. Selective Service regulations supplement the bare text of Sec. 5(d) of the Act, 50 U.S.C. App. 305, by the following:

> "(b) A 'regular minister of religion' is a man who customarily preaches and teaches the principles of religion of a recognized church, religious sect, or religious organization of which he is a member,

without having been formally ordained as a minister of religion; and who is recognized by such church, sect, or organization as a minister."

"(c) A 'duly ordained minister of religion' is a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect, or religious organization, to teach and preach its doctrines and to administer its rites and ceremonies in public worship; and who customarily performs those duties."

8. By letter dated June 10, 1941, the Deputy Collector [Director] of the Selective Service System invited Hayden Covington, apparently in his capacity as Vice-President of Jehovah's Witnesses, to submit lists of several categories of persons associating with Jehovah's Witnesses. On June 12, 1941, the Selective Service System promulgated an "Opinion", Vol. 3, No. 14, in which it was stated "The unincorporated body of Jehovah's Witnesses are considered to constitute a recognized religious sect, and that the nature of their activities, the record kept of them, and their work places them in a position where they may be recognized as having a standing in relation to the organization and the other members of Jehovah's Witnesses similar to that occupied by regular or duly ordained ministers of other religions." The opinion proceeded to recite that the names of those of the sect who (Par. 3) devote their full time and effort to the manufacture and production of books, pamphlets and supplies, etc. (elsewhere referred to as the "Bethel Family"), and also members known as "pioneers" who (Par. 4) "*spend all or a substantial part of their time*" . . . in the "work of teaching the tenets of their religion and in the converting of others to their belief, and who enjoy the esteem of other Jehovah's Witnesses, are recorded in the executive office of the Watch Tower Bible and Tract Society and that "members of this group have a standing in relationship to that organization and the other

members of Jehovah's Witnesses" which brings them within the purview of Section 5(d) of the Selective Training and Service Act of 1940, and "they *may be classified in Class IV-D, providing their names appear on the certified official list of such persons transmitted to State Directors of Selective Service by National Headquarters of the Selective Service System.*" (Italics supplied)

9. On November 2, 1942, an amendment of Opinion No. 14 was promulgated which made no change in the instructions for the classification of members of the Bethel Family and pioneers except that it did add this sentence: "The status of members of the Bethel Family and pioneers whose names do not appear upon such certified official list shall be determined under the provisions of Paragraph 5 of this Opinion." Paragraph 5 of the amended opinion reads as follows:

> "The members of Jehovah's Witnesses, known by the various names of members of the Bethel Family, pioneers, regional servants, zone servants, company servants, sound servants, advertising servants, and back-call servants, *devote their time and efforts in varying degrees* to the dissemination of the tenets and beliefs of Jehovah's Witnesses. The deference paid to these individuals by other members of Jehovah's Witnesses also varies in a great degree. It is impossible to make a general determination with respect to these persons as to their relationship to Jehovah's Witnesses. Whether or not they stand in the same relationship as regular or duly ordained ministers in other religions must be determined in each individual case by the local board, based upon whether or not they devote their lives in the furtherance of the beliefs of Jehovah's Witnesses, *whether or not they perform functions which are normally performed by regular or duly ordained ministers of other religions,* and, finally,

whether or not they are regarded by other Jehovah's Witnesses in the same manner in which *regular or duly ordained ministers of other religions are ordinarily regarded.*" (Italics supplied)

10. The name of the petitioner was at no time shown to have been included in the list of ordained ministers known either as "Bethel Family" or "pioneer" furnished National Headquarters of the Selective Service System, although the petitioner personally and through the affidavits had of associates had represented that he had been an ordained minister since 1939. Whether this list after November 2, 1942, was supplemented by subsequent additions to the membership of the Bethel Family and the pioneers does not appear in the evidence.

11. The Year Book of Jehovah's Witnesses for 1943, which was the only item of evidence originally received at the hearing on the pending writ, and which purports to cover a report for the fiscal year of 1942 and to have been copyrighted in that year, recites under the heading "Ordained": "These followers of the Lord, who have chosen to follow a course the same as He did when He was upon the earth, are ordained ministers of the gospel. A man doesn't represent God because some creature says he is God's representative. The only way anyone could determine who are ordained of God is to judge them by their works." And again,—"There are many other ordained ministers of Jehovah's witnesses whose names are not listed in this year's report, but those that are listed are specially equipped to look after their ministerial duties at the headquarters of the Watch Tower Bible and Tract Society or its branches or as traveling evangelists." Then follows lists of the Bethel Family and of the Pioneers in neither of which appeared the petitioner's name.

12. Under date of February 4, 1943, the petitioner addressed to the local board a letter calling attention to the amendment to Opinion No. 14 referred to above. On

April 3, 1943, having been recently notified of a 1-A classification, he wrote to request a personal hearing and appended to his letter a request as follows:

> "I request that you enter upon the classification record in the space provided the date you receive this request and also the date and time fixed for me to appear, and promptly mail to me notice of time and place fixed for my appearance, as provided in section XXVI, of the Selective Service Regulations."

13. On November 9, 1944, he was ordered to report for induction. He did so report and after being found acceptable for induction refused to submit to induction and his case was accordingly referred by the local board to the U. S. Attorney for criminal prosecution. On trial, he admitted to the court that when he reported he was resolved not to submit. He acted, so he testified, without legal advice and testified that he reported and submitted to examination "so that I could according to my own understanding of legal proceedings exhaust my civil remedies."

DISCUSSION AND CONCLUSIONS

The Selective Service regulations, as quoted in the foregoing findings, define a "duly ordained minister of religion" as one "who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect, or religious organization." It is apparent from the literature of "Jehovah's Witnesses" which is in evidence and particularly its Year Book, that the sect does not have any ceremonial ritual of ordination or any prescribed course of discipline which is recognized as a prerequisite to a sectarian classification as an "ordained minister". Judging from the literature in evidence any member of the sect who mentally resolves to consecrate himself to the teaching and preaching of its doctrines considers himself an ordained minister, and if his subsequent conduct is in harmony with that self-consecration he comes to be recog-

nized by the individual members of the sect with whom he comes into contact as an ordained minister of the sect.

Certainly there is no evidence in the case that this petitioner was ever ordained in any ceremonial ritual, and although it does appear that prior to his claimed ordination at the age of 16 his Bible study was under the direction of members of the sect there is no evidence of any course of discipline of specified content prescribed as a prerequisite to ordination to which this petitioner conformed.

The administrative definition of a "regular minister of religion" is broader. However, the definition includes recognition by a recognized sect. The definition I think implies a recognition by the sect as an organization as distinguished from recognition by individual members of the sect. This conclusion is emphasized by the apparent absence of any prescribed qualifications for membership and authentic record of the roster of members. Here, to be sure, the petitioner submitted to his draft board affidavits of several persons representing themselves to be associated with the sect in various capacities but there is a complete absence of evidence to show that these affiants have any more authority to certify to the petitioner's status than he to theirs. Thus at most the petitioner's affirmative evidence of his ministerial status consists of nothing more than an accumulation of mutually self-serving declarations.

That the regulation contemplates official, organizational, as distinguished from individual, recognition is further suggested by the arrangement noted in the findings whereby the organization was invited to supply the Selective Service Headquarters with official lists, and by the fact that is apparent from its own publications that it did maintain such lists. But the petitioner here was not included in such lists,—at least so far as the evidence discloses.

The only evidence that I find which resembles official recognition is the photostat of a certificate of the Watch Tower Bible and Tract Society, Incorporated, dated Oc-

tober 5, 1942, reciting that the petitioner was baptized in December 1939, devotes his entire time to missionary work, "has taken a course of study in the Bible and Bible helps prescribed by this Society, and has shown himself apt to preach and teach" and that "he has the scriptural ordination to preach." The certificate continues: "He is therefore declared by this Society a duly ordained minister of the gospel." This certificate is signed by J. Sullivan (if I have deciphered the signature correctly) as "Superintendent of Evangelists." There is, however, no evidence in the record as to the powers and authority of Mr. Sullivan. I notice in the Year Book, which is in evidence, a report of the meetings of the Watch Tower Bible and Tract Society (a Pennsylvania corporation) and the Board of Directors of the Watch Tower Bible and Tract Society, Inc., a New York corporation, held for the election of a President to succeed J. F. Rutherford, deceased. The report announces the unanimous election of Nathan H. Knorr as President and Hayden C. Covington as Vice-President. The Year Book also records annual meeting of the Pennsylvania corporation on October 1st, 1942, at which a resolution was adopted wherein the members "duly assembled as legal representatives of our brethren throughout the world" declared (in part):

> "(4) That for more than sixty years Jehovah has used faithful men, C. T. Russell and J. F. Rutherford, as his servants to fill the office of President, the chief executive office of the Society, to oversee the affairs of the earthly part of Jehovah's organization under direction from the Lord;
>
> "(5) All faithful servants of the Lord have recognized that The Theocracy, of which the Watch Tower Bible and Tract Society is a servant, operates from Top down, and not from the bottom up as in the worldly governments, and therefore, that instructions come to the Lord's people on earth from the office

of the president of the Watch Tower Bible and Tract Society, filled by anointed men chosen of the Lord in his organization;

"(6) We recognize before the Lord that Brother N. H. Knorr is His chosen servant to fill the office of president vacated by the passing on of Brother J. F. Rutherford to a higher office and field of service in Jehovah's organization; and that with this change in personnel in office the organization has not changed one bit, but that it has continued forward with greater speed and increase than ever before known in the history of God's earthly organization."

Whatever powers Mr. Knorr or other corporate officers may have derived from this resolution or from other sources does not otherwise appear. Still less is there evidence in the record to show authority in Mr. Sullivan to certify the classification of an ordained minister or to show what the requirements for such a certificate may be. Cf. *Ex parte Stewart*, 47 F. Supp. 415.

I thus conclude that the action of the administrative agencies did not necessarily conflict with the regulations as properly construed.

However, the opinion of the Deputy Director noted in my findings may be taken as indicating an administrative practice which sanctions some relaxation of the regulations. Cf. *Goodwin* v. *Rowe*, 49 F. Supp. 703, and *Ex parte Stewart*, supra. And this opinion clearly contemplates the propriety of a IV-D classification in certain cases in which there is no legal evidence of official recognition by the sect. The opinion makes it plain that the board was to judge each such case on its individual merit and suggests tests so broad and vague that considerable room is left for the discretion of the board. However, since the practice thus sanctioned is by way of relaxation of lawful regulations registrants who claim exemption are in no position to

charge that an administrative discretion which can operate only in their favor is illegal for its vagueness.

Turning to the content of Paragraph 5 of the Opinion, quoted above in my findings, it will be noted that one of the tests suggested is whether or not such registrants "devote their lives in furtherance of the beliefs of Jehovah's Witnesses" and "whether or not they perform functions which are normally performed by regular or duly ordained ministers of other religions." Since, under the opinion, members on the official list are deemed to come within the purview of the statutory exemption only if they "devote all or substantially all of their time" to the teachings of their sect, it is only reasonable to believe that this same requirement should be deemed incorporated in the test broadly stated in Paragraph 5, quoted just above, for alleged ministers not on the official list. The tests also fairly suggest that the continuity of full-time activity is an important factor. I quite agree with the holding in *U. S. ex rel. Hull* v. *Stalter*, 151 F. 2d 633, that the classification should be made on the basis of the registrant's status at the time of classification. I think, however, that his status at that time may depend in part, at least, upon the continuity of his previous full-time service.

Looking then to the facts of this case, we see that the petitioner's Selective Service file showed that after the petitioner at the age of 16 years came to consider himself ordained as a minister his full-time service was interrupted first by a year's attendance at high school (and as it was later developed at the trial by part-time attendance at a night trade school). Thereafter his full-time ministry was again interrupted by full-time employment for the greater part of a year as an industrial worker. After this employment terminated, on his own representations he was classified as IV-D. He was not reclassified as 1-A until, as he himself admitted, he was currently employed as a commercial model.

His secular employment being thus admitted, its extent became a proper factor in the determination of his status. *Ex parte Stewart,* supra. He offered no corroboration whatever of his testimony that only a weekly average of two hours was spent in his commercial employment. Since in the administrative proceedings before the board the burden of proof was upon the registrant to sustain his claim of exemption under a IV-D classification, the absence of corroboration was significant. *U. S. ex rel. Steinberg* v. *Graham,* 57 F. Supp. 938; *Rose* v. *United States,* 129 F. 2d 204; *Harris* v. *Ross,* 146 F. 2d 355; and *U. S.* v. *Geesen,* 59 F. Supp. 726. The evidence shows that his own testimony on the point, though received and considered by the local board was not fully believed. Surely the petitioner's right to present evidence and have it considered does not include an iron-clad right to have all his testimony believed. Here the board's recorded skepticism as to the petitioner's veracity was later confirmed by his admission at the trial that in order to obtain secular employment he had deliberately misstated his age. This is so even if, as his counsel offered at the trial to prove, the employment was sought to enable him to accumulate a fund for self-support during a coming period of ministerial activity. If he lied, as he admits, to obtain pecuniary means of support for his ministerial activity it is not unreasonable to infer that he might have lied to escape such interference with his ministry as would result from a 1-A classification.

All things considered, it cannot be said that the board acted without evidence. The *Estep* opinion does not suggest that a court may invalidate an administrative finding merely because on the same evidence it might have found otherwise: instead it expressly holds to the contrary.

Nor is there evidence of arbitrary or capricious administrative action. The fact that the board for so long continued the petitioner's IV-D classification is convincing demonstration that its members were not unduly prejudiced

by his mere membership in the sect. Petitioner's counsel, however, contends that his conduct in posing in military uniform for commercial gain while enjoying exemption under a IV-D classification created a prejudice against him in the mind of the board.

The fact that the petitioner from such soft work enjoyed a higher rate of compensation than basic army pay might possibly have had a tendency to create prejudice. But an administrative determination having at least some support in the evidence may not properly be invalidated merely because of a possibility of prejudice resulting from the petitioner's own conduct. Otherwise, in any case invidious or contemptuous conduct might in practical effect serve as a ground of exemption and thus thwart the urgent legislative objective. When, as noted above, there was conceded evidence of commercial as well as ministerial employment, the administrative action must be attributed to the state of the evidence, and not to a state of emotion not affirmatively shown to have existed. *U. S ex rel. Hull v. Stalter*, 154 F. 2d 633.

It may be further noted, however, that at the petitioner's trial the court allowed a member of the local board to be cross-examined by petitioner's counsel as to the mental processes upon which the official determination was based. In so doing, the court went further, I should suppose, than the law required for the protection of the petitioner's rights. However that may be, the cross-examination, instead of disclosing prejudice, elicited testimony to just the opposite effect.

Other allegations in the petition have not been overlooked. It recites that after the petitioner was finally classified by the local board as 1-A, the board "refused to permit him to offer full evidence of his exemption and denied a fair hearing, thus abridging his procedural rights to make a complete record before the Board of Appeal." In view of his testimony at the time of the trial that the Board re-

ceived all the evidence and testimony which he offered and the fact that his entire file was transmitted to the Board of Appeal, I can only treat this allegation as made out of extravagance. Certainly it has not been sustained.

The petitioner further alleges that the Board violated the Selective Service Regulations in that it "failed to make a full, adequate and complete record in writing of all the evidence offered at said hearing", in violation of Regulations 622, 623 and 627.13. This latter regulation, it is true, requires that, on notice of appeal, "if any facts considered by the Local Board do not appear in the written information in the file, the Local Board shall prepare and place in the file a written summary of such facts." However, this requirement plainly does not contemplate that the file in the case must be expanded by irrelevancies; all that is required is that the record shall be sufficiently complete to enable the Board of Appeal to perform its assigned function and make a classification on the basis of the record received from the local board. Regulation 627.24. If the Board of Appeal deems the file to be incomplete, provision is made for its correction. Reg. 627.23. Here, however, the Board of Appeal made no request for correction of the file: apparently it considered the file sufficient for the proper performance of its function.

It is true, as was stated in my findings, that the only written minute of the petitioner's testimony as to the extent of his employment as a commercial model was brief and indicated that the local board had found the defendant's answers "evasive". And it is also true that Reg. 627.13 stated that "in preparing such a summary the local board should be careful to avoid the expression of any opinion *concerning information* in the registrant's file and should refrain from including any argument in support of its decision."

Having in mind that under the administrative system only the local board had opportunity to see and hear the

witnesses and thus to form a first hand conclusion as to their veracity and that the Board of Appeal acts only on the written record, I do not construe the regulation just quoted as prohibiting the local board from indicating that it has questioned the veracity of the witness on a specified point.

Even if under a proper construction of the regulations it were felt that the local board had failed to fully comply with Reg. 627.13, the defect was at most technical and not of such substance as to infringe any constitutional right. Indeed, it appears to have been waived. For under Reg. 627.12 the registrant may attach to his notice of appeal "a statement specifying the respects in which he believes the local board has failed to consider or give sufficient weight, and may set out in full any information which was offered to the local board and which the local board failed or refused to include in the registrant's file." As my findings show, the petitioner here availed himself of this right to the full extent desired but made no charge that the minutes of the local board were inadequate.

In this connection, it may be noted that this petitioner was neither dull nor ignorant of his legal rights. Scarcely a month after his statement of appeal had been filed he reported for induction, as he himself testified, in order to "exhaust my civil remedies." If he knew that submission to the board order was necessary for such a purpose it is fairly inferrable that he knew enough to include in his statement of appeal any evidence which would have been favorable to him. Moreover, the note appended to his letter to the Board imported familiarity with the Regulations. (Finding 12)

The foregoing conclusions, in my view, dispose of this case on the merits. But more is needed to dispose of all of the petitioner's contentions. For he argues that his constitutional rights were violated not only by the Selective Service agencies but by the trial court as well, and that

unless he is given an opportunity to have a jury pass upon a defense which according to my ruling, though admissible in law, is without support in the facts, his remedy is incomplete.

But as to this, the Sixth Amendment of course does not require submission to a jury of an issue of fact wholly unsupported by the evidence. At the petitioner's trial he testified that he had told the local board of his current commercial activity and his previous full-time commercial employment. Thus by his own concession the board had some evidence in support of its 1-A classification and it could not be said that its action was without evidence. A careful examination of the transcript discloses that all the evidence received and all the factual evidence (as distinguished from argument and conclusions) which the defendant at his trial had offered to prove, contained no basis for a finding that the local board had acted arbitrarily or illegally. That being so, no question as to the validity of the administrative action was left for submission to the jury. And the charge of the trial judge which excluded from the jury a consideration of the validity of the classification can perhaps be justified, without collision with the law as later announced by the Supreme Court, by the absence of evidence to support an attack on the validity of the classification. As Mr. Justice Douglas observed in the *Estep* case, the provision of the Act that the decisions of the local boards shall be *final* "means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant."

It is true that in the Estep and Smith cases the Supreme Court ordered new trials. But in so doing the court was acting under the appellate process upon appeals directly taken from the convictions complained of. In such a situation it was not the function of the appellate court of last resort to make an original determination as to the validity of the underlying administrative orders. It does not follow that in the pending habeas corpus proceedings sitting here at the base of the judicial pyramid I should assume to issue such a mandate to a sister court. Under the writ I have power only to release or remand.

Mr. Justice Holmes observed in *Frank* v. *Mangum*, 237 U. S. 309, 345:

> " . . . habeas corpus cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell."

Having invoked the writ the petitioner cannot complain if I look behind the trial and examine the validity of the administrative action thus cutting "to the very tissue of the structure" of his grievance. This I have done and find that the petitioner has failed to sustain the burden of proving the invalidity of the administrative action complained of. The burden of proof was on the petitioner. *Johnson* v. *Zerbst*, 304 U. S. 458, 468; *Estep* v. *U. S.*, supra.

And if, as I hold, the administrative action was valid in law and in fact, the action of the trial court could not possibly have deprived the petitioner of a valid defense.

IT IS ACCORDINGLY ORDERED that the writ be discharged and that the petitioner be remanded.

Dated at New Haven this 6th day of May, 1946.

C. C. Hincks
United States District Judge

Notice of Appeal

Now comes petitioner, John Myron Kulick, in the above entitled cause and hereby gives notice of appeal to the United States Circuit Court of Appeals for the Second Circuit from the judgment and order of this Court dated May 6, 1946, discharging the writ of habeas corpus as prayed for in the petition and remanding the petitioner to custody of respondent, wherein petitioner avers that he is held and restrained in violation of the Constitution.

Said petitioner herewith files his bond on appeal in the amount of $500.00 as required by the Rules of Civil Procedure of the District Courts of the United States.

HAYDEN C. COVINGTON
117 Adams Street
Brooklyn 1, New York
Attorney for Petitioner

Order Admitting to Bail

On this 20th day of June A. D. 1946 came on to be heard the application of John Myron Kulick to be admitted to bail pending appeal from the judgment and order remanding him to custody of M. L. Kennedy, Warden and upon hearing counsel it is hereby

ORDERED that the said petitioner, John Myron Kulick, be released from custody during the pendency of such appeal upon the filing with the Clerk of this Court a bond in the sum of Two Thousand Dollars ($2000.00) condition in the term and manner required by law, with good and sufficient surety. The condition of such bond shall be upon the petitioner Kulick making his appearance before the United States District Court for the District of Connecticut, and delivering himself to the United States Marshal for the District of Connecticut to return to the custody of the

respondent or his successor, upon final disposition of such appeal: It is further

ORDERED that the respondent shall release John Myron Kulick from custody upon receipt of a certified copy of this order and a copy of said bond filed with the Clerk, which shall be sent to him by mail by the Clerk of this Court.

Enter. Done at New Haven, Connecticut, on this 20th day of June, 1946.

C. C. Hincks
United States District Judge

Bail Bond

Whereas, on the 20th day of June, A. D. 1946, the United States District Court for the District of Connecticut, pursuant to the Rules of the United States Circuit Court of Appeals for the Second Circuit admitted the petitioner, John Myron Kulick to bail and from the custody of the respondent, M. L. Kennedy, pending a disposition of an appeal to the United States Circuit Court of Appeals for the Second Circuit from the judgment discharging and dismissing the writ of habeas corpus and remanding Kulick, in which order the amount of the bond was fixed at Two Thousand ($2,000.00) Dollars

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS, that we, John Myron Kulick, Principal, and the undersigned surety, are held and firmly bound unto M. L. Kennedy, and the United States of America, in the just and full sum of Two Thousand ($2,000.00) Dollars to the payment whereof, well and truly to be made, we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

SEALED with seal and dated this 21st day of June, in the year of our Lord one thousand nine hundred and forty-six.

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, that whereas, the aboye John Myron Kulick, who stands committed and remanded to the custody of the respondent, M. L. Kenedy, to serve the sentence imposed against him by the United States District Court for the Southern District of New York, desiring to appeal from the judgment discharging the writ of habeas corpus and remanding said petitioner and having stated in open court that he shall appeal from said judgment, having appealed from such judgment and having been ordered admitted to bail on the condition that he fully and promptly comply with the final orders and judgment that may be entered upon said appeal, and it is further the condition of said obligation that if the said John Myron Kulick, shall make his personal appearance before the United States District Court for the District of Connecticut and deliver himself to the United States Marshal for the District of Connecticut to be surrendered to the custody of the respondent, M. L. Kennedy, Warden, or his successor in office, in event the judgment of this Court is affirmed upon appeal, when the mandate is returned to the District Court upon said appeal, or if the said John Myron Kulick shall make his personal appearance before the United States District Court for the District of Connecticut and deliver himself to the United States District Court when the mandate is returned to the District Court upon said appeal submit himself to such order and judgment as announced upon appeal and make full and prompt compliance with such further order and judgments as may hereafter be announced by the District Court in this cause upon the return of the mandate upon appeal, then this obligation to be void, and in event he fails to make full and prompt compliance with the foregoing terms and conditions this obligation shall remain in full force and effect.

Executed, to which witness our hands and seals this

the 21st day of June, 1946, at New Haven, Connecticut.

John Myron Kulick, Principal
NATIONAL SURETY CORPORATION
By
Attorney in Fact.

The foregoing bond is approved and ordered filed this the 21st day of June, A. D. 1946.

C. C. Hincks, Judge
United States District Court.

ORDER

DIRECTING CLERK OF UNITED STATES DISTRICT COURT TO SEND ORIGINAL EXHIBITS TO COURT OF APPEALS FOR SECOND CIRCUIT TO BE INCORPORATED IN TRANSCRIPT OF RECORD BY REFERENCE

On this day of June 1946 came on to be heard the application of petitioner-appellant, JOHN MYRON KULICK, for an order directing the Clerk of the United States District Court to send to the Clerk of the United States Circuit Court of Appeals for the Second Circuit, along with the transcript of the record in this cause, the original exhibits received in evidence and considered by the court in deciding this case; and the court being of the opinion that such application should be in all things granted, it is hereby

ORDERED that the Clerk of this court incorporate all the exhibits into the transcript by reference and that when the transcript of the record is prepared and sent to the Clerk of the United States Circuit Court of Appeals all of such exhibits shall accompany the transcript in their original form, without the necessity of copying any of said exhibits.

Done at New Haven, Connecticut, on this day of June 1946.

C. C. Hincks *United States District Judge*

ORDER
Extending Time to File Transcript of Record

On this 26th day of June 1946 came on to be heard, in the above entitled and numbered cause, the application of the petitioner-appellant for an order extending the time to file the transcript of the record in the Court of Appeals; and the court upon consideration thereof is of the opinion that the application should be granted. It is therefore accordingly

ORDERED that the time to file the transcript of the record with the Clerk of the United States Circuit Court of Appeals for the Second Circuit be extended to and including August 1, 1946.

Done at New Haven, Connecticut, on this 26th day of June 1946.

C. C. Hincks
United States District Judge

Stipulation as to Record and Exhibits

It is hereby stipulated and agreed between the parties that in lieu of a typewritten transcript of the record prepared by the Clerk the record upon appeal in this cause may be printed by appellant and certified by the Clerk for filing in printed form with the Clerk of the United States Circuit Court of Appeals for the Second Circuit.

It is stipulated that the printed transcript of the record to be tendered to the Clerk for certification shall include the following:

1. Petition for writ of habeas corpus.
2. Order granting writ of habeas corpus.
3. Writ of habeas corpus.
4. Return of respondent.
5. Supplemental return of respondent.
6. Stenographer's report of proceedings and evidence

received upon the hearing of the writ of habeas corpus, including original exhibits introduced in evidence, by reference.

7. Memorandum decision of the district judge containing findings of fact and conclusions of law and the order remanding petitioner to custody and discharging the writ of habeas corpus.

8. Notice of appeal.

9. Appeal bond.

10. Order extending time for filing transcript.

11. Order directing the sending up of original exhibits to the court of appeals.

12. Copy of this stipulation.

13. Certificate of the Clerk to the printed transcript incorporating the original exhibits by reference into the transcript.

In order to simplify consideration of the appeal, all documents, papers and exhibits received in evidence omitted from the printed record on appeal may be referred to orally and in briefs and handed up to the court on argument of the appeal with the same force and effect as though incorporated herein.

Dated July 9, 1946.

ADRIAN W. MAHER
United States Attorney

VALENTINE J. SACCO
Ass't United States Attorney

HAYDEN C. COVINGTON
Attorney for Defendant-Appellant

Stipulation as to Record and Exhibits

It is hereby stipulated and agreed that the foregoing printed papers tendered by the Petitioner-Appellant are correct in every particular. With the exhibits, made a part hereof by reference, and all of which may be filed with and submitted to the Circuit Court of Appeals in their original form, it contains all the evidence in this cause. The said exhibits are hereby made a part of this record upon appeal. The foregoing are stipulated to be the record in this cause upon appeal.

The foregoing record is a true transcript of the record of the District Court. It is stipulated that the Clerk shall file it in lieu of the original papers. The Clerk of this court is requested to certify the foregoing printed copy of the record to the Clerk of the Circuit Court of Appeals as the record on appeal in this cause.

Dated, New Haven, Connecticut, July , 1946.

ADRIAN W. MAHER
United States Attorney

By
Ass't United States Attorney

HAYDEN C. COVINGTON
Attorney for Petitioner-Appellant

Clerk's Certificate

I, Charles E. Pickett, Clerk of the District Court of the United States of America for the District of Connecticut, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties, and stipulated to be filed in this court.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at New Haven, Connecticut, in the District of Connecticut this day of July in the year of our Lord one thousand nine hundred and forty-six, and of the Independence of the said United States the one hundred and seventy first.

[Seal] CHARLES E. PICKETT, Clerk

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 52. October Term, 1946

Argued October 8, 1946—Decided October 29, 1946

Docket No. 20311

UNITED STATES EX REL. JOHN MYRON KULICK, APPELLANT

v.

M. L. KENNEDY, WARDEN, APPELLEE.

Before L. HAND, SWAN, and FRANK, Circuit Judges.

Appeal from an order of the District Court for the District of Connecticut, dismissing a writ of habeas corpus to release the relator from custody under a conviction for failing to submit to induction into the United States Army.

Hayden C. Covington, for the appellant.
Valentine J. Sacco, for the appellee.

L. HAND, Circuit Judge:

Kulick appeals from an order, dismissing a writ of habeas corpus, issued to discharge him from custody under a judgment, entered upon the verdict of a jury, convicting him of failing to submit to induction into the United States Army. The only issue is whether he was deprived of the defense that the induction order of the local board, affirmed by the appeal board, was invalid which had denied him exemption under § 5 (d) of the Act, as "a regular or ordained minister." Three questions arise: (1) whether he may avail himself of habeas corpus at all, because he failed to appeal from the judgment; (2) if so, how far the writ can serve as a substitute for an appeal; (3) whether, if it is a sufficient substitute, he was prevented from proving as a defense that the induction order was invalid. The facts ~~were as follows:~~ Kulick registered for the draft on June 30, 1942, and filled out and mailed his questionnaire on December 5, 1942, which he accompanied by two documents, claiming exemption as a "regular or ordained minister" of the sect of Jehovah's Witnesses. He was ordered to report for preliminary physical examination on January 2, 1943, and was found fit; and on March 30, 1943,

311, Title 50, Appendix, U. S. Code.

the local board—"Local Board No. 254"—classified him as "1A," and so advised him. Apparently the documents, which he submitted on December 5th, satisfied the board that he was entitled to the exemption, for on May 5, 1943, they wrote him that he had been so classified. Nothing happened to disturb this for over a year; but on August 23, 1944, the board received a telephone message from a Mrs. Greenbaum, who was connected in some way with another local board—"Local Board 255"—that "a mother of three sons in service was at Board 255 raising quite a fuss because this boy is *not* in service. According to this neighbor Kulick spends most of his time around the house when he isn't posing (at times in uniform) earning $40 an hour." On the same day, undoubtedly because of this information, the local board reclassified Kulick as "1A," and so wrote him; and this it followed on August 25 by an order directing him to report for a "pre-induction" physical examination on September 11th. On the 26th he replied by a letter, again claiming exemption under § 5 (d), and asking for a hearing, which the board gave him on the 30th. At that time he submitted an affidavit and a written statement, asserting that he was a "regular or ordained minister" of Jehovah's Witnesses; and he testified at length. (There was no stenographer present, and the only record of what he said is his own testimony at the trial and that of one member of the board whom he then called.) At the conclusion of the hearing the board again voted to retain him in "1A" and so informed him on the 31st.

He reported for his "pre-induction" physical examination on September 11th, as ordered, and was again found physically fit. He appealed to the appeal board on or about September 16th, which on September 28th affirmed the order of the local board. He must have learned of the affirmance before October 8th, for on that day he asked for another hearing by the local board, which was granted. He appeared on the 11th, but there is no record of what took place except that his classification was not disturbed. On October 16th, he wrote to the Director of Selective Service, asking him to appeal to the President; but, as the Director did not do so, the local board ordered him to report for induction on November 9th; and on that day he did appear at the induction center, but refused to take the oath. The trial upon the indictment for so refusing, came on in the Southern District of New York on May, 1945, and the judge acting in conformity with the rule laid down in *Falbo* v. *United States*,[1] left no question to the jury except whether

[1] 320 U. S. 549.

Kulick had refused to be inducted; although during the trial he did, somewhat inconsistently, allow some testimony to be admitted, bearing upon the hearings before the local board. However, he ruled out many questions which would have been material if the validity of the board's order had been an issue, and prevented a proper development of the defense, if it was one. Kulick was sentenced on May 7, 1945, and never appealed. The petition for the writ now at bar was filed on February 27, 1946, while Kulick was serving his sentence in Danbury, Connecticut.

On February 4, 1946, the Supreme Court handed down its decision in *Estep* v. *United States*,[1] which held that those drafted, after exhausting their administrative remedies, might challenge the validity of the Board's order inducting them into the Army, upon a trial for violating § 311. Until then it had been generally supposed that the earlier decision in *Falbo* v. *United States*, *supra*,[2] forbad this, and that upon such a trial the invalidity of the induction order was not in issue. Although *Billings* v. *Truesdell*,[3] had held that those who refused to be inducted were not subject to court martial, nothing more followed from this than that the civil courts alone had jurisdiction to decide who were members of the armed forces; those who resisted induction still remained subject to prosecution under § 311, without defense that their induction had been illegal. During this period we twice affirmed convictions in which any inquiry into the validity of the induction had been refused, and many other circuits ruled the same way.[4] The Supreme Court denied certiorari to our decision in *United States* v. *Flakowicz*, *supra*,[5] on April 30, 1945, and although, when *Estep* v. *United States*, *supra*,[6] was in the circuit court of appeals, two of the six judges (Biggs and Leahy, JJ.) dissented, that was in July, 1945; and Kulick's time to appeal from his conviction had expired on May 12, 1945.

The first question is whether the situation between May 7, 1945, when Kulick was convicted, and May 12th, when his time to appeal had expired, made any appeal so obviously fruitless as to excuse taking one; and whether, if it did, that opened the road after February 6, 1946, to a review of his conviction by habeas corpus. The district judge in the case

[1] 327 U. S. 114.
[2] 320 U. S. 549.
[3] 321 U. S. 542.
[4] Seventy other decisions are collected in Justice Frankfurter's opinion in *Estep* v. *United States*, *supra*, at 120 (327 U. S. 114).
[5] 146 Fed. (2) 874.
[6] 325 U. S. 851.
[7] 327 U. S. 114.

at bar thought it did, and we agree. We shall not discuss at length the occasions which will justify resort to the writ, where the objection has been open on appeal. After a somewhat extensive review of the authorities twenty-four years ago,[10] I concluded that the law was in great confusion; and the decisions since then have scarcely tended to sharpen the lines. We can find no more definite rule than that the writ is available, not only to determine points of jurisdiction, *stricti juris*, and constitutional questions; but whenever else resort to it is necessary to prevent a complete miscarriage of justice. The occasion at bar is such; certainly the reasons for allowing it are more compelling than were those in *Bowen* v. *Johnston*,[11] where there merely appeared "to be uncertainty and confusion * * * whether offenses within" a national park "are triable in the state or federal courts." It would pass all fair demands upon Kulick's diligence to conclude him because of his failure to appeal. Not only had there not been any glimmer of a positive chance of success, but there had been an unusual consensus of judicial opinion against it in the lower courts. Moreover, although a number of the decisions could be explained upon the ground that those inducted had not wholly exhausted their administrative remedies;[12] in a number of others they had done so; and no distinction had been established between the two. Indeed, in *United States* v. *Flakowicz*, *supra*,[13] which had been one of these, the Supreme Court denied certiorari only a fortnight before May 12th. While that court has said over and over again that such denials are not to be taken as affirmances, it was not to be expected on May 12, 1945, that the court would grant a writ in precisely the same circumstances in which it had just denied one. Our reasoning so far has the support of the Fourth Circuit in *Sunal* v. *Large*.[14] As for *Rea* v. *McDonald*,[15] it was decided on January 12, 1946, at which time there was no ground for allowing a writ, for *Falbo* v. *United States*, *supra*,[16] was still regarded as controlling. Nor does it trouble us that certiorari in that case was denied after *Estep* v. *United States*, *supra*,[17] had been decided. Perhaps after February 6, 1946, Rea could have shown as an excuse for a new writ that he had been misled; but at the time he sued out the writ which he did sue out, there

[10] *Ex parte Craig*, 282 Fed. Rep. 141, 155–159.
[11] 306 U. S. 19.
[12] *United States* v. *Nelson*, 143 Fed. (2) 584 (C. C. A. 2).
[13] 146 Fed. (2) 874.
[14] 157 Fed. (2).
[15] 153 Fed. (2) 190 (C. C. A. 5).
[16] 320 U. S. 549.
[17] 327 U. S. 114.

was no such excuse. We hold therefore that the district judge had jurisdiction to entertain the writ, and the next question is how far it may search the record in the criminal trial.[18]

The books are indeed full of statements that habeas corpus goes only to the jurisdiction of the court, or at least to matters fundamental to the exercise of its power like the constitutionality of a statute; and that it can never be used as a substitute for an appeal. The Fourth Circuit in *Sunal* v. *Large*, *supra*,[19] thought this limitation applicable to the situation before it, which was the same as that at bar. It did indeed examine the record before the local board to see whether there was substantial evidence to support the finding; but, having found that there was, it refused to go further; and we are not altogether clear why it thought that if could go even so far as it did. In any event it appears to us that if the writ is to be allowed at all, it must extend to whether the accused was denied the right to establish, by any evidence available to him, that the induction order was invalid. He may do this, either because from all the evidence before the board, recorded or not, there appeared to be no basis for its decision; or because the board for any reason had denied him a fair hearing. As we understand it, at his trial he may call the members of the board and may himself take the stand; he may testify to what he told them, and he may cross-examine them as to their motives, and in general as to the basis of their finding. In conclusion he may ask the jury to say whether, in the light of all that they have heard, it is not plain that the board did deny him a fair hearing, and did no try to classify him as he deserved. If he can satisfy even a single juror that this is true, (conceivably, even if he can arouse in the juror's mind a doubt about it), he will succeed. So far as appears, in *Sunal* v. *Large*, *supra*,[20] the court did not mean to say that the issue was not as broad as we have just described it; and possibly the record of Sunal's trial disclosed nothing more than an offer of the written record before the local board. If so, we should agree that, if that record showed sufficient evidence to support the classification, and no basis for suspecting bias or prejudice, its exclusion was not an error. Be that as it may, in the case at bar that was not the sum of what Kulick showed, and tried to show, and incidentally, as we have said, the record before the board did not preserve any testimony there taken. Surely it can never be tenable to make critical what chances to be

[18] *Callan* v. *Wilson*, 127 U. S. 540.
[19] 157 Fed. (2).
[20] 157 Fed. (2).

preserved in that record. Evidence is no less evidence because it is not recorded; and anything which in fact tends to establish that the accused did not have a fair hearing must be available in support of his defense, from whatever source it comes. Therefore, it seems to us that, if the writ is to go at all, it must search the record at the trial without reserve, at least so far as to enable the habeas corpus court to decide from all the evidence which was before the board, whatever its form, whether the order was valid. We submit that it would be absurd at once to say that the accused may use the writ, and yet so to circumscribe its office that he cannot redress the wrong, whose assumed existence is the only reason for not confining him to an appeal. To that extent we hold that habeas corpus is the full substitute.

The last question is whether, in the light of what we have just said, there is ground for a reversal of the conviction. Even without considering the rulings at the trial which shut out the full development of the defence, enough got in to support at least a plausible argument that a verdict should have been taken. The board had originally granted the exemption, and had left it undisturbed for over a year; and the jury could scarcely have failed to conclude that it was the communication from "Local Board 255" which caused the change. That communication was in two parts; first, it spoke of the "fuss" made by the angry mother of three sons; second, it contained a statement about Kulick himself; and it was by no means inevitable that the first might not have had, not necessarily a controlling, but at least a contributing, part in the change of classification. Furthermore, Kulick apparently persuaded the board at the August hearing that he regularly preached five hours a day; and there was strong reason for saying that that made him a "regular minister" within the extremely latitudinarian interpretation which "Opinion No. 14" put upon the term, "regular minister," when applied to Jehovah's Witnesses.[21] However, we will not say that, standing alone, this did make a case for a verdict; for it did not stand alone. One cannot read the record of the trial without being at once persuaded that the judge circumscribed Kulick in proving his de-

[21] "Whether or not they stand in the same relationship as regular or duly ordained ministers in other religions must be determined in each individual case by the local board, based upon whether or not they devote their lives in the furtherance of the beliefs of Jehovah's Witnesses, whether or not they perform functions which one normally performed by regular or duly ordained ministers of other religions, and finally, whether or not they are regarded by other Jehovah's Witnesses in the same manner in which regular or duly ordained ministers of other religions are ordinarily regarded."

fense, defined as we have defined it. It was inevitable that he should have done so as he understood the law; indeed, the surprising thing is that he should have allowed as much to go in as he did.

For the foregoing reasons we hold that the judgment must be reversed, and Kulick must be discharged from custody. That, however, need not end the prosecution, as would be true, if the writ went merely to the jurisdiction of the court, or to the constitutionality of the statute. The indictment will remain open to any further action which the prosecution may choose to take.

Order reversed; relator discharged.

United States Circuit Court of Appeals
Second Circuit

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 29th day of October one thousand nine hundred and forty-six.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Jerome N. Frank, Circuit Judges.

United States ex rel. John Myron Kulick,
relator-appellant

v.

M. L. Kennedy, Warden, etc.,
respondent-appellee

Appeal from the District Court of the United States
for the District of Connecticut

This cause came on to be heard on the transcript of record from the District Court of the United States for the District of Connecticut, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the order of said District Court be and it hereby is reversed, and relator discharged in accordance with the opinion of this court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, *Clerk.*

[Judgment, United States Circuit Court of Appeals, Second Circuit. Filed October 29th 1946. Alexander M. Bell, Clerk.]

UNITED STATES OF AMERICA,
Southern District of New York:

I, Alexander M. Bell, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 92, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of United States ex rel. John Myron Kulick, Petitioner-Appellant, against M. E. Kennedy, Warden, Respondent-Appellee, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 3rd day of December, in the year of our Lord one thousand nine hundred and forty-six, and of the Independence of the said United States the one hundred and seventh-first.

[SEAL] (S) ALEXANDER M. BELL, *Clerk.*

Supreme Court of the United States

No. 840, October Term, 1946

Order allowing certiorari

Filed January 20, 1947

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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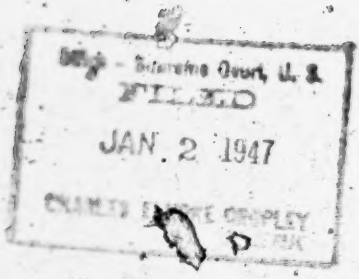

No. 840

In the Supreme Court of the United States

OCTOBER TERM, 1946

M. L. KENNEDY, WARDEN, PETITIONER

v.

UNITED STATES EX REL. JOHN MYRON KULICK

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. —

M. L. KENNEDY, WARDEN, PETITIONER

v.

UNITED STATES EX REL. JOHN MYRON KULICK

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Acting Solicitor General, on behalf of the petitioner, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit, entered October 29, 1946 (R. 87), ordering respondent discharged from petitioner's custody.

OPINION BELOW

The opinion of the circuit court of appeals (R. 81–87) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered October 29, 1946 (R. 87). The juris-

diction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether, after conviction for refusing to submit to induction, respondent is entitled to resort to habeas corpus to challenge the judgment of conviction on the ground that the convicting court improperly rejected his proffered defense that his selective service classification was invalid.

2. If habeas corpus is an available remedy, whether the inquiry by the habeas corpus court should be limited to the question whether the defense was tendered and rejected by the convicting court or whether the habeas corpus court should also inquire into the jurisdiction of the classifying board.

STATEMENT

Respondent was indicted (R. 22) for refusing to submit to induction on November 9, 1944, in violation of the Selective Training and Service Act. He had a jury trial in the District Court for the Southern District of New York at which his selective service file was received in evidence, but other evidence proffered by him purportedly for the purpose of showing that his selective service classification was invalid was excluded, and the jury was instructed that the classification was final and not open to attack in

the criminal trial (see R. 14–15, 86–87). He was convicted, and on May 7, 1945, he was sentenced to imprisonment for three and one-half years (R. 21). He did not appeal (see R. 83). Thereafter, on February 27, 1946, he filed a petition for a writ of habeas corpus in the District Court for the District of Connecticut challenging the validity of his imprisonment under the judgment of conviction (R. 6–19). Briefly, the petition alleged that the judgment was void (1) because respondent is a minister of religion and the selective service boards therefore had no jurisdiction over him, (2) because the judicial proceedings were founded on a void induction order, and (3) because at his criminal trial respondent was denied the opportunity to prove "any substantial defense" to the indictment. Respondent alleged in detail the facts upon which he predicated these contentions and he prayed that the court review the question of his exemption from duty under the Act and the proceedings before the classifying boards.

The writ issued on February 27, 1946 (R. 23–24), and petitioner filed a return (R. 26–29) and a supplemental return (R. 30–33) challenging the power of the court to review the judgment of the convicting court and the proceedings before the selective service boards and setting forth a chronological summary of the administrative proceedings. At the habeas corpus hearing petitioner tendered to the court, *inter alia*, respondent's selective service file and a transcript of the proceed-

ings at respondent's criminal trial, both of which were admitted in evidence (see R. 37–40). Respondent introduced in evidence a copy of his requests to charge and exceptions to the charge of the convicting court (R. 44–45, 47–51). He tendered no other evidence in the habeas corpus court.

In a memorandum opinion (R. 52–72), the district court below held that habeas corpus was available to respondent to determine whether he had been denied any constitutional right (R. 55), and it then turned to the questions whether there was a basis in fact for the refusal of the selective service boards to classify respondent as a minister and whether the boards failed in any material respect to comply with the Selective Service Regulations. The court held that there was evidence to support the classification, that there was no evidence of arbitrary or capricious administrative action, and that respondent had not been denied any procedural right (R. 67–70). Having thus determined that the administrative action was "valid in law and in fact," the court concluded that respondent had not been deprived of a valid defense by the convicting court (R. 72). Accordingly, the writ was discharged. Respondent was thereafter released on bail pending appeal (R. 73–74).

Upon appeal to the Circuit Court of Appeals for the Second Circuit, the judgment was reversed (R. 87). The court held that habeas corpus

was available to respondent, and that it is in the nature of a substitute for an appeal from the conviction, although respondent failed to take such an appeal. Reasoning from the premise that respondent was entitled to show, if he could, the invalidity of his induction order at his criminal trial, the court reversed the judgment of the district court discharging the writ of habeas corpus because respondent had not been allowed to make the defense at his trial. The circuit court of appeals did not pass on the question of the local board's jurisdiction.

SPECIFICATION OF ERRORS TO BE URGED

The circuit court of appeals erred:

1. In holding that habeas corpus is an available remedy to inquire into the validity of the ruling of the convicting court rejecting respondent's proffered defense of invalid classification.

2. If habeas corpus is an available remedy, in failing to inquire into the jurisdiction of the local board, as the *Estep* opinion requires.

3. In reversing the judgment of the district court.

REASONS FOR GRANTING THE WRIT

1. In *Estep* v. *United States*, 327 U. S. 114, 124, this Court said that where, as here, a proffered defense of illegal classification is rejected at the criminal trial for refusing to submit to induction, habeas corpus after conviction is available "to

challenge the jurisdiction of the local board." This means, we think, that the habeas corpus court should conduct a collateral inquiry into the legality of the induction order, and that the petitioner is to be discharged from custody only if it is determined that the local board exceeded its jurisdiction. Quite plainly, the habeas corpus court can decide a challenge to the jurisdiction of the board only by examining the administrative record and any other pertinent evidence for the purpose of determining whether there was a basis in fact for the classification or whether the local board departed from the selective service regulations in any substantial respect.

This is the view which the Circuit Court of Appeals for the Fourth Circuit adopted in *Sunal* v. *Large*, 157 F. 2d 165, which is now pending on petition for a writ of certiorari, No. 535, and it is the view which the district court adopted in this case. Both courts inquired into the jurisdiction of the local board and, having determined in each case that the classifying boards had not exceeded their jurisdiction, the courts remanded the prisoner to the custody from which he sought release. The court below, however, has taken a different view. Without adverting to the dictum in the *Estep* opinion that habeas corpus after conviction will lie for the purpose of testing the jurisdiction of the local board and without passing on the question of the jurisdiction of the local board, the circuit court of appeals ordered respondent dis-

charged from petitioner's custody because the convicting court refused to admit respondent's proffered defense of illegal classification. In so ruling, the court failed to adhere to the *Estep* decision, and it rendered a decision which is in conflict with the Fourth Circuit's decision in the *Sunal* case.

2. The decision below proceeds on a theory different from the theory indicated in the *Estep* and *Sunal* cases. Instead of inquiring into the jurisdiction of the local board, the court below limited its inquiry to the proceedings in the convicting court, and, having concluded that that court erred in rejecting the proffered defense of misclassification, the court held that the judgment of conviction was void. We think there is no warrant in habeas corpus law for this position. The error of the convicting court consisted in its misconstruction of the provision of Section 10 (a) (2) of the Selective Training and Service Act that the classification of the selective service boards shall be final. This was an error in the exercise of jurisdiction which was correctible on appeal. It does not assume the proportions of a jurisdictional defect, and it is not a denial of any constitutional right. This, we think, is aptly illustrated by the decision in *Collins* v. *Johnston*, 237 U. S. 502. In that case, a petition for habeas corpus was predicated on the claim that the petitioner, who had been convicted of perjury, was deprived of due process because the convicting

court refused to consider "a valid and legally conclusive defense," viz., that the false testimony upon which the prosecution was predicated was not material to the trial in which it was given. In respect of the question whether the convicting court lost its jurisdiction by denying the proffered defense, this Court said (237 U. S. at 507):

> Nor are we able to see that the refusal of the proffered defense, even were such refusal erroneous, could at all affect the jurisdiction of the court, or amount to more than an error committed in the exercise of jurisdiction. The averment that the defense was "arbitrarily refused" merely states a conclusion of law, and is of no effect in the absence of facts sufficient to show that the ruling was in truth arbitrary; and no such facts are alleged.

The same conclusion was reached by the Circuit Court of Appeals for the Fifth Circuit in *Rea* v. *McDonald*, 153 F. 2d 190, certiorari denied, 327 U. S. 794.

Significantly, the court below did not seek to sustain its decision on the theory that the convicting court lost its jurisdiction by the erroneous exclusion of the proffered defense or that respondent was deprived of due process in the convicting court. Instead, adverting to *Bowen* v. *Johnston*, 306 U. S. 19, the court pointed out that exceptional circumstances required relief by habeas corpus in this case. However, *Bowen* v. *Johnston* involved a question of jurisdiction of the convicting court,

and the exceptional circumstances in that case were invoked to justify an inquiry into that question even though the prisoner had not appealed from his conviction. As we understand it, the decision does not contemplate that merely because a defendant may be able to show good reason for not having appealed from the judgment of conviction he may resort to habeas corpus to correct a trial error, which is the situation in this case.

The consequence of the doctrine of the court below is that in almost every case such as this the selectee will be entitled to secure his release from imprisonment and a new trial in which inquiry will be made for the first time into the jurisdiction of the local board. If his defense fails at the new criminal trial, he will be sentenced anew and probably commence a new term of imprisonment. Under the view announced in the *Estep* decision and which the Fourth Circuit followed in the *Sunal* case, the habeas corpus court itself inquires into the jurisdiction of the local board. If the court determines that the board exceeded its jurisdiction, the prisoner is discharged from custody and the case is ended. On the other hand, if the court reaches a contrary conclusion, the prisoner is required to serve the remainder of the sentence imposed upon him. In neither event does a new criminal trial become necessary and the interests of both sides are fully protected.

3. This case presents more than the question whether the habeas corpus court should limit itself

to determining whether the proffered defense was rejected in the convicting court or should go further and determine whether the local board exceeded its jurisdiction; it presents as well the broader question whether habeas corpus is an available remedy where there was no appeal from the judgment of conviction and where the convicting court had jurisdiction and did not deny the defendant any constitutional right. See *Rea* v. *McDonald*, 153 F. 2d 190 (C. C. A. 5), certiorari denied, 327 U. S. 794. The language of the *Estep* decision bearing on the availability of habeas corpus is obiter dicta phrased in terms of "it would seem." 327 U. S. at 124. As such, it is open to critical examination in this case, and in view of the novelty of the view expressed,[1] we submit that such examination is necessary.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

GEORGE T. WASHINGTON,
Acting Solicitor General.

JANUARY 1947.

[1] None of the deportation cases to which the Court adverted in the *Estep* decision and which involved inquiries into the jurisdiction of the administrative agency, was concerned with a situation like that in this case, where an intervening judgment of a court of competent jurisdiction stands unreversed and the prisoner is confined pursuant to that judgment, not pursuant to the administrative order.

U. S. GOVERNMENT PRINTING OFFICE: 1946

No. 840

In the Supreme Court of the United States

OCTOBER TERM, 1946

MYRL ALEXANDER, WARDEN, PETITIONER

v.

UNITED STATES EX REL. JOHN MYRON KULICK

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 840

MYRL ALEXANDER, WARDEN, PETITIONER

v.

UNITED STATES EX REL. JOHN MYRON KULICK

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the district court (R. 52–72) is reported at 66 F. Supp. 183. The opinion of the circuit court of appeals (R. 81–87) is reported at 157 F. 2d 811.

JURISDICTION

The judgment of the circuit court of appeals was entered October 29, 1946 (R. 87). The petition for a writ of certiorari was filed January 2, 1947, and was granted January 20, 1947 (R. 89). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether, after conviction for refusing to submit to induction, respondent is entitled to resort to habeas corpus to challenge the judgment of conviction on the ground that the convicting court improperly rejected his proffered defense that his selective service classification was invalid.

2. If habeas corpus is an available remedy, whether the inquiry by the habeas corpus court should be limited to the question whether the defense was tendered and rejected by the convicting court or whether the habeas corpus court should also inquire into the jurisdiction of the classifying board.

3. If the latter, whether the habeas corpus court erred in finding that the final classifying board did not exceed its jurisdiction in refusing to classify respondent as a minister of religion.

STATUTE AND REGULATIONS INVOLVED

The pertinent statutory provisions and regulations are set forth in the Appendix, *infra*, pp. 57–66.

STATEMENT

A. *The administrative proceedings.*—The proceedings before the selective service boards, as shown by respondent's selective service file which is before the Court as an original exhibit, may be summarized as follows:

Respondent registered with his local board on June 30, 1942, giving his age as nineteen. On December 5, 1942, he filed his selective service

questionnaire. In that document he stated that he had a high school education and that he was ordained in December 1939, and started functioning as a minister of religion in the Jehovah's Witnesses sect in 1939. He further stated that he had worked from 1941 to 1942 in the maintenance of mechanical radio signal apparatus. Other evidence before the board showed that this referred to his full-time job with the Radio Corporation of America, which respondent gave up shortly after he registered with his local board in June 1942. Respondent attached to the questionnaire a statement in which he asserted *inter alia*, that he had studied the Bible from 1935 to 1939, and that he was baptized in December 1939. He also submitted a document from the Watchtower Bible and Tract Society which contained the additional fact that respondent had become a "pioneer" in the sect on July 1, 1942—one day after he registered with his local board.

On December 31, 1942, the local board was advised by State Selective Service Headquarters that respondent's name was not included in the list of ministers furnished to the Selective Service System by the Watchtower Bible and Tract Society. Thereafter, on February 4, 1943, respondent submitted a copy of Opinion No. 14 of the Director of Selective Service, which held that a person whose name was not on the list could be classified as a minister if the local board determined that the proof submitted by the registrant

satisfactorily demonstrated his ministerial status. On March 29, 1943, the local board classified respondent in I–A. He requested a personal appearance before the board and submitted supporting documents from four other Jehovah's Witnesses to the effect that he was a minister of religion. On April 29, 1943, respondent was reclassified IV–D, as a minister of religion.

Nothing further occurred until August 23, 1944, when the local board was indirectly informed by one of respondent's neighbors, who was identified, that respondent spent most of his time at home, except when working as a professional model, in which capacity he sometimes posed in military uniform. Apparently as a result of this information the local board reclassified respondent I–A. He then requested a hearing before the board. Respondent submitted an additional statement of his own and a statement from another Jehovah's Witness to the effect that he devoted 150 hours each month to his religious activities and that among his duties he performed those of a "stock servant," "study conductor" and an "instructor" in the theocratic ministry course. Respondent appeared before the local board on August 30, 1943, and at the conclusion of the hearing the following notation was made as a minute entry in respondent's file:

> When registrant appeared it was learned after interrogation that he was an artist model—and has been photographed in mili-

tary uniform; when further questioned regarding C. O. in military uniform his reply was evasive.

The board continued respondent in I–A. Thereafter he took an appeal to the board of appeal and on September 8 he submitted a statement on appeal to the board, as the selective service regulations permit,[1] in which he informed the board; *inter alia*, that he did not average two hours a week in secular work. He underwent a preinduction physical examination, and on September 28, 1944, the board of appeal unanimously classified respondent I–A.

On October 8, 1944, respondent requested another hearing before the local board. A hearing was had on October 11, but the classification was not reopened. On October 19, respondent requested the Director of Selective Service to appeal his case to the President, but the request was not granted. Respondent was then ordered to report for induction on November 9, 1944. He reported, but refused to submit to induction.

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[1] Section 627.12 provides:

"The person appealing may attach to his notice of appeal or to the Selective Service Questionnaire (Form 40) a statement specifying the respects in which he believes the local board erred, may direct attention to any information in the registrant's file which he believes the local board has failed to consider or give sufficient weight, and may set out in full any information which was offered to the local board and which the local board failed or refused to include in the registrant's file."

B. *The judicial proceedings.*—Thereupon, respondent was indicted (R. 22) for refusing to submit to induction, in violation of the Selective Training and Service Act of 1940. He had a jury trial in the District Court for the Southern District of New York at which the material contents of his selective service file were received in evidence (Tr. 35–46),[2] but other evidence proffered by him for the purpose of showing that his selective service classification was invalid was excluded (Tr. 62, 64–66, 81–89, 92–94, 99–103). The jury was instructed (Tr. 190–194) that the classification was final and not open to attack in the criminal trial. Respondent was convicted and on May 7, 1945, he was sentenced to imprisonment for three and one-half years (R. 21). He did not appeal (R. 35–36).

On February 4, 1946, this Court decided *Estep* v. *United States,* 327 U. S. 114. On February 27, respondent filed the present petition for a writ of habeas corpus in the District Court for the District of Connecticut (R. 6–19). In general terms, respondent alleged that the indictment and subsequent judicial proceedings are void because he is a minister of religion and the draft board therefore had no authority to order him to submit to induction; that the indictment and subsequent ju-

[2] The designation "Tr." refers to the stenographic transcript of the criminal trial which is before the Court as an original exhibit.

dicial proceedings are void because they are founded on a void induction order; and that the judgment and commitment are void because at the trial respondent was denied the right to trial by jury and was denied the opportunity to prove "any substantial defense" to the indictment (R. 7). The petition summarized the proceedings before the selective service boards (R. 8–14) and in the convicting court (R. 14–16) and requested the habeas corpus court to review the question of respondent's exemption from military service under the Act, and to pass on his contention that the final classification of the board of appeal had no support in evidence and resulted from prejudice and arbitrariness on the part of the board (R. 17).

The writ issued on February 27, 1946 (R. 23–24), and petitioner filed a return (R. 26-29) alleging that respondent was confined pursuant to a valid judgment and commitment and denying the power of the court, on the basis of the facts alleged, to review either the judicial or administrative proceedings. Thereafter, petitioner filed a supplemental return (R. 30–33), which set forth a chronological summary of the administrative proceedings. At the habeas corpus hearing, petitioner tendered to the court a stenographic transcript of the proceedings in the convicting court, respondent's selective service file, and the 1943 yearbook of the Watchtower Bible and Tract So-

ciety, all of which were admitted in evidence (R. 37–43). The only evidence adduced by respondent consisted of a copy of his exceptions to the charge of the convicting court (R. 44–45, 47–51). He submitted no evidence bearing on the proceedings before the selective service boards.

In a memorandum opinion (R. 52–72), the district court below held that habeas corpus was available to respondent to determine whether he had been denied any constitutional right (R. 55), and it then turned to the questions whether there was a basis in fact for the refusal of the selective service boards to classify respondent as a minister and whether the boards failed in any material respect to comply with the Selective Service Regulations. The court held that there was evidence to support the classification, that there was no evidence of arbitrary or capricious administrative action, and that respondent had not been denied any procedural right (R. 67–70). Having thus determined that the administrative action was "valid in law and in fact," the district court concluded that respondent had not been deprived of a valid defense by the convicting court (R. 72). Accordingly, the writ was discharged. Respondent was thereafter released on bail pending appeal (R. 73–74).

Upon appeal to the Circuit Court of Appeals for the Second Circuit, the judgment was reversed (R. 87). The court held that habeas corpus was

available to respondent, and that it is in the nature of a substitute for an appeal from the conviction, although respondent failed to take such an appeal. Reasoning from the premise that respondent was entitled to show, if he could, the invalidity of his induction order at his criminal trial, the court reversed the judgment of the district court discharging the writ of habeas corpus because respondent had not been allowed to make the defense at his trial and ordered respondent released from custody. The circuit court of appeals did not pass on the question of the local board's jurisdiction.

SPECIFICATION OF ERRORS TO BE URGED

The circuit court of appeals erred:

1. In holding that habeas corpus is an available remedy to inquire into the validity of the ruling of the convicting court rejecting respondent's proffered defense of invalid classification.

2. If habeas corpus is an available remedy, in failing to inquire into the jurisdiction of the local board, as the *Estep* opinion requires.

3. In reversing the judgment of the district court.

SUMMARY OF ARGUMENT

I

In a habeas corpus proceeding such as this the sole inquiry is whether the convicting court initially had jurisdiction of the person and the

subject matter and whether anything occurred in the course of the trial to cause it to lose jurisdiction. *Bowen* v. *Johnston*, 306 U. S. 19, 23–24. It is undisputed that the convicting court had jurisdiction of the person of respondent, that the prosecution was founded upon a constitutional statute, and that the indictment alleged a crime "cognizable under the authority of the United States." Section 24 (2) of the Judicial Code, 28 U. S. C. 41 (2). The initial jurisdiction of the court is therefore established. We think it equally clear that the court did not lose jurisdiction in the course of the trial by virtue of its exclusion of respondent's tendered defense.

In May 1945, when respondent went to trial, it was the consensus of judicial opinion that the provision of Section 10 (a) (2) of the Act making the board's classification final meant that the classification was subject to judicial scrutiny only after the registrant had submitted to induction. The decision in *Falbo* v. *United States*, 320 U. S. 549, was regarded by the lower federal courts, by prosecuting officials and by most members of the bar as firmly establishing this construction. Therefore, when respondent sought to defend in the criminal trial for refusing to submit to induction on the ground that his classification was illegal, the trial judge had no hesitation in excluding the defense. The decision in the *Estep* case, 327 U. S. 114, almost one year later, establishes

that the finality provision of the Act does not foreclose judicial inquiry into the jurisdiction of the boards in a prosecution for refusing to submit to induction, and it likewise establishes that the convicting court here adopted the wrong construction of the statute. Thus, the crucial question is whether the erroneous, but tenable, construction of the statute caused the court to lose jurisdiction or, as respondent contends, amounted to a denial to respondent of an opportunity to defend.

This Court considered an analogous question in *Collins* v. *Johnston*, 237 U. S. 502, 506–507, where it was contended that the exclusion in a perjury trial of a proffered defense that the false testimony was not material to the trial in which it was given deprived the convicting court of jurisdiction to enter judgment. The Court held that the refusal of the proffered defense, if erroneous, was an error committed in the exercise of jurisdiction, which was not subject to collateral inquiry in habeas corpus. Bearing in mind the admonition of Mr. Justice Holmes in *Lamar* v. *United States*, 240 U. S. 60, 64–65, that "Jurisdiction is a matter of power and covers wrong as well as right decisions," we think the holding of this Court in the *Collins* case requires the same conclusion here. The Fourth (*Sunal* v. *Large*, 157 F. 2d 165, pending on writ of certiorari, No. 535) and Fifth (*Rea* v. *McDonald*, 153 F. 2d 190, certiorari denied, 327 U. S. 794) Circuits have held in similar selective

service cases that an erroneous construction of the finality provision of Section 10 (a)-(2) is an error of law correctible on appeal and does not affect the jurisdiction of the convicting court. Cf. *Warring* v. *Colpoys*, 74 App. D. C. 303, 122 F. 2d 642, certiorari denied, 314 U. S. 678. Numerous illustrations are cited in the Argument (*infra*, pp. 33–34) of analogous situations in which this Court has held that a variety of serious errors of law in the course of a trial are not matters affecting the jurisdiction of the convicting court.

The contention that the error of the convicting court must be treated as a denial of the right to defend is untenable. Respondent enjoyed every right of defense which our judicial procedure guarantees. If he were retried today, he would be treated no differently, except that in view of the *Estep* decision, the trial court would hold that the defense of illegal classification is admissible. Thus, the sole purpose of a new trial would be to correct an error of law in the course of the trial. This is qualitatively quite different from the situation in *Windsor* v. *McVeigh*, 93 U. S. 274, where the defendant was denied the opportunity to be heard at all. See *Escoe* v. *Zerbst*, 295 U. S. 490, 494.

In May 1945, when the judgment of conviction was entered, the jurisdiction of the convicting court was plain. Today, the *Estep* decision reveals an error of law on the part of the trial

court, but it does not establish that the court lost jurisdiction to enter its judgment.

This case is not of the same pattern as *Eagles* v. *Samuels*, No. 59, decided December 23, 1946, or *Bridges* v. *Wixon*, 326 U. S. 135. In those cases the petitioner was detained pursuant to an administrative order, and the habeas corpus court probed the legality of the order. Here, respondent was detained pursuant to a judgment and commitment of the United States District Court for the Southern District of New York. The function of the writ is to inquire into the jurisdiction of that court. Since respondent was not detained pursuant to the order of his local board, there is no occasion to inquire into the legal validity of that order.

II

In *Estep* v. *United States*, 327 U. S. 114, 123–125, this Court said that if, upon a trial for refusing to submit to induction, a registrant could not defend "* * *" on the ground that the local board had no jurisdiction in the premises, it would seem that the way would then be open to him to challenge the jurisdiction of the local board after conviction by *habeas corpus*." If, despite the considerations advanced in Point I of the Argument, the Court reaffirms the *Estep* dictum, the decision of the circuit court of appeals nevertheless is erroneous. For notwithstanding the fact that respondent requested the district court

in the habeas corpus hearing to inquire into the legality of his classification (see R. 17–18), and that the court complied with the request, the court below held that the habeas corpus court possessed no authority collaterally to inquire into the administrative proceedings. The Second Circuit held that the sole inquiry was to determine whether a tenable defense was offered and rejected in the convicting court, and having concluded that respondent made out a tenable defense, the court reversed the judgment of the district court without passing on the jurisdiction of the selective service boards, as the *Estep* dictum requires. Thus, there still remains for decision the question whether the board of appeal exceeded its jurisdiction in refusing to classify respondent as a minister of religion.

III

Assuming that, following its practice in similar cases, this Court decides to consider the jurisdiction of the selective service boards without remanding the case for consideration thereof by the Second Circuit, the only remaining question is whether there is any evidence to support the refusal of the board of appeal to classify respondent as a minister of religion.

The administrative interpretation of the ministerial exemption as applied to the Jehovah's Witnesses sect permits the board to classify a registrant in IV–D if it determines that he stands

in the same relationship to members of his sect as a minister stands to his congregation in other religious groups. See State Director Advice No. 213–B, *infra,* pp. 60–65. This is to be determined in each individual case based upon—

1. Whether the registrant devotes his life in furtherance of the beliefs of Jehovah's Witnesses; and

2. Whether he performs functions which are performed by regular or duly ordained ministers of other religions; and

3. Whether he is regarded by other Jehovah's Witnesses in the same manner in which regular or duly ordained ministers of other religions are ordinarily regarded.

The facts which were before the board of appeal when respondent was finally classified are summarized, *supra,* pp. 2–5.[2] Among the facts which militate against respondent's claim, which the board was entitled to regard as persuasive, are the following: (1) respondent was a young boy who had no specialized religious training in preparation for the ministry other than that which all Jehovah's Witnesses have in studying the Bible; (2) after he allegedly became a minister, respondent obtained a full-time secular job in an industrial plant and retained it until shortly after he registered for the draft; (3) although he tendered evidence showing that he was a "pioneer" in the sect, his name was not contained

in the list of "pioneers" furnished the Selective Service System by the Watchtower Society and the list published by the sect in its magazine "Consolation"; (4) respondent did not inform the board after he was classified IV–D that he was engaged in work as a model, which work included posing in uniform; (5) when respondent was interrogated concerning these activities his answers were "evasive"; (6) respondent's claim that he did not average two hours a week in secular work was uncorroborated, although records of his employment were undoubtedly available to him; (7) a neighbor informed the board that when respondent was not working as a model, he usually was at home; (8) there is no evidence that respondent performed the functions usually associated with a minister or that his activities differed in quality from those of other members of the sect.

Viewing respondent's situation as a whole, we submit that the board of appeal could reasonably have concluded that respondent is a devout member of the sect, but that neither in training nor in function is he in any different status from that of the other members of the sect. He was not the spiritual leader of the local unit of the sect. He was a member of the sect who claimed that commencing on the day after he registered for the draft, he devoted five hours daily to the regular activities of the sect. Since it is clear that the board's conclusion did not flout the command of Congress, judicial inquiry is at an end.

ARGUMENT

It is now settled law that a registrant who has exhausted his administrative remedies is free to challenge the validity of an induction order of his local board by showing that the board exceeded its jurisdiction. *Estep* v. *United States*, 327 U. S. 114; *Gibson* v. *United States*, No. 23, this Term, decided December 23, 1946. Thus, where a registrant has submitted to induction he may do this by resorting to habeas corpus to challenge the legality of his being held for military service. See *Eagles* v. *Samuels*, No. 59, this Term, decided December 23, 1946. Where he refuses to submit to induction, the *Estep* decision establishes that he is free to assert the challenge as a defense in his criminal trial for having refused to submit to induction. This case presents a third situation, which although discussed in the *Estep* opinion (327 U. S. at 123–125), has not yet been before this Court for decision. Respondent refused to submit to induction and upon his trial for failure to perform a duty required by the Selective Training and Service Act he tendered the defense of illegal classification; it was rejected, and upon his conviction he came into petitioner's custody pursuant to the judgment of the convicting court.

The basic question here is whether and to what extent habeas corpus is now available to correct the error of the trial court.

In the discussion which follows, we consider first whether habeas corpus is available at all in the circumstances of the present case. We examine the judgment of conviction, show that it is neither void nor deficient in any element of constitutional fairness, and hence conclude that habeas corpus will not lie to release one held in custody pursuant to its terms.

Alternatively, if this view is rejected, we turn to the dictum in the *Estep* case which states that habeas corpus is available after conviction to inquire into the jurisdiction of the local board, and we conclude that, even if this approach be adopted, the court below erred in not making collateral inquiry into the local board's jurisdiction.

Assuming then that such inquiry should now be made, we discuss the considerations which support the judgment of the district court in the present proceeding that respondent's local board did not exceed its jurisdiction but properly classified respondent as one available for military service.

I

SINCE RESPONDENT WAS IN PETITIONER'S CUSTODY PURSUANT TO A JUDGMENT WHICH, THOUGH ERRONEOUS IN THE LIGHT OF DECISIONS THEREAFTER RENDERED, WAS NOT VOID, THERE IS NO BASIS FOR ORDERING HIS DISCHARGE ON HABEAS CORPUS

The substantial difference between this case and cases such as *Eagles* v. *Samuels, supra,* p. 17, and *Bridges* v. *Wixon,* 326 U. S. 135, and the various

other deportation cases collected in footnote 14 of the *Estep* opinion (327 U. S. at 123), is the existence here of a final valid judgment of a court of competent jurisdiction pursuant to which respondent was held in petitioner's custody. In the *Samuels* case the propriety of the exercise of military jurisdiction over the petitioner depended on the legality of his induction order. In the deportation cases the petitioners were confined on the basis of deportation orders. In these situations habeas corpus probes the jurisdiction of the administrative agency to make the order pursuant to which the petitioners were in custody. In this case, however, respondent was not confined pursuant to an administrative order; petitioner's custody of respondent was in compliance to a judgment and commitment of the United States District Court for the Southern District of New York. It is respondent's burden to demonstrate that petitioner's custody of him pursuant to that judgment is "in violation of the Constitution or of a law * * * of the United States * * *" (R. S. 753, 28 U. S. C. 453).

At this late date, it is fundamental habeas corpus law that where the convicting court has jurisdiction of the person and subject matter in a criminal prosecution the judgment of conviction is not subject to collateral attack.[3] "The scope of

[3] See generally, Dobie, *Habeas Corpus in the Federal Courts*, 13 Va. L. Rev. 433.

review on *habeas corpus* is limited to the examination of the jurisdiction of the court whose judgment of conviction is challenged." If there was no jurisdiction in the convicting court from the beginning or if in the course of the proceedings the defendant's constitutional rights have been denied, habeas corpus is available. *Bowen* v. *Johnston*, 306 U. S. 19, 23–24; *Hawk* v. *Olson*, 326 U. S. 271, 274–276; *Eagles* v. *Samuels*, *supra*, slip opinion, p. 7.[4] It is equally well settled that a collateral examination of the power of the convicting court to render its judgment does not extend to an inquiry into "mere errors in point of law, however serious, committed by the criminal court in the exercise of its jurisdiction over a case properly subject to its cognizance." *Frank* v. *Mangum*, 237 U. S. 309, 326; *Matter of Gregory*, 219 U. S. 210, 213; *Harlan* v. *McGourin*, 218 U. S. 442, 447–448; *Hans Nielsen, Petitioner*, 131 U. S. 176, 184.

[4] In *Waley* v. *Johnston*, 316 U. S. 101, 104–105, this Court characterized the circumstances in which habeas corpus extends to the denial of a constitutional right as follows:

"* * * The facts relied on are dehors the record and their effect on the judgment was not open to consideration and review on appeal. In such circumstances the use of the writ in the federal courts to test the constitutional validity of a conviction for crime is not restricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial court to render it. It extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights."

See also, *Lamar* v. *United States*, 240 U. S. 60, 64–65. In the words of Mr. Chief Justice Marshall in *Ex Parte Watkins*, 3 Pet. 193, 203:

> An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity, if the court has general jurisdiction of the subject, although it should be erroneous.

We think there can be no question under the cases that the convicting court was not initially without jurisdiction. For the court had jurisdiction over the person of respondent, the prosecution was founded upon a constitutional statute, and the indictment alleged a crime "cognizable under the authority of the United States." Section 24*(2) of the Judicial Code, 28 U. S. C. 41 (2). It was for the court to determine in the exercise of its jurisdiction whether respondent knowingly failed to perform a duty required of him by the act, as the indictment alleged, and in performing this function the court had power to rule on the admissibility of evidence tendered by respondent and on the legal validity of any defense asserted by him. *Knewel* v. *Egan*, 268 U. S. 442, 446; *Matter of Gregory*, 219 U. S. 210, 217; cf. *Chicot County Dist.* v. *Bank*, 308 U. S. 371, 376; *Stoll* v. *Gottlieb*, 305 U. S. 165, 171–172.

When petitioner went to trial, it was the Government's burden to prove that he was a registrant under the Selective Training and Service Act who

had been finally classified I–A and ordered to report for, and submit to, induction, and that respondent knowingly refused to do this. The Government's evidence established these facts. In meeting the Government's case, respondent was entitled to show that he did not act knowingly or that he had no duty under the statute. And it is now settled by the *Estep* decision that one way in which he could make the latter showing was by establishing that his local board had exceeded its jurisdiction in classifying him I–A and ordering him to report for induction.

However, at the time of the trial a different view of the law prevailed. As the court below noted (R. 82–84), in May 1945, it was the consensus of judicial opinion that the finality provision of Section 10 (a) (2) of the Act foreclosed all judicial investigation of the legality of a selective service classification until the registrant had submitted to induction. See *Estep* v. *United States*, 327 U. S. at 123, and the concurring opinion of Mr. Justice Frankfurter at pages 138–139. Accordingly, when respondent proffered his defense of illegal classification the trial court rejected it. It is plain from the trial court's rulings on the question that the Court regarded the *Falbo* decision as dispositive of the contention advanced by respondent. We now know that the *Falbo* decision did not foreclose the defense, and that the fact that a selective service classification is "final"

does not mean that after the administrative remedies have been exhausted judicial inquiry may not be had into the jurisdiction of the selective service boards. But this hindsight establishes only that the trial court committed an error of law. The error of the trial judge was that he undoubtedly either misread the *Falbo* decision or misconstrued the finality provision of Section 10 (a) (2), or probably did both. But that is all. The trial judge did not surrender his function to outsiders or conduct a sham trial. He performed his function in the highest traditions of the judicial office, accorded respondent an eminently fair trial, but as occasionally occurs, he made what was subsequently held to be an error of law.

Respondent alleged in his petition for a writ of habeas corpus (R. 7, 15–16) and argued in the district court (R. 36, 37) that this error of law constitutes a denial of his right to defend to the indictment and is thus a deprivation of due process of law and of his right to a jury trial. Accordingly, it was argued that the convicting court lost jurisdiction to render its judgment. Respondent is unable to point to any authority which holds that an erroneous, though tenable, construction of a statute, which results in the exclusion of evidence shown to be material for the defense carries with it any such constitutional implications—not unnaturally, perhaps, because all the cases which

have ever passed squarely on the question hold precisely the contrary.

Due process in the constitutional sense means a prosecution under a valid law conducted according to the settled course of judicial proceedings, which includes notice and a hearing before a court of competent jurisdiction according to established modes of procedure. *Frank* v. *Mangum*, 237 U. S. 309, 326. In the instant case, respondent was tried in a manner consistent with the requirements of due process, and in accordance with the established modes of judicial procedure.

In the course of that trial, the court was called upon to construe Section 10 (a) (2) of the Selective Training and Service Act and the *Falbo* decision. Its construction was neither arbitrary nor unreasonable; to the extent that the trial court had a choice between two views of the finality provision of Section 10 (a) (2), it adopted the one which at the time was unanimously accepted by bench and bar, and which three Justices of this Court thought was required. See *Estep* v. *United States, supra*. Indeed, at the time of the trial, a contrary ruling could have been made only in the teeth of established precedents, and it is not without significance that respondent so far acquiesced in the result that he did not appeal. But, right or wrong, the trial court's ruling did not involve any deprivation of constitutional

right. "* * * in general the decision of a court upon a question of law, however wrong and however contrary to previous decisions, is not an infraction of the Fourteenth Amendment merely because if is wrong or because earlier decisions are reversed." *Patterson* v. *Colorado*, 205 U. S. 454, 461.

The subsequent decision of this Court in the *Estep* case shows only that the trial court adopted the wrong construction of the Selective Training and Service Act, and that, if the case were still open for direct appeal, the appellate court would be required to reverse the judgment. But we are not dealing here with direct review by way of appeal; this is collateral review by way of habeas corpus, to inquire into the jurisdiction of the convicting court. And the decisions make it perfectly plain that a trial court has power—i. e., jurisdiction—to construe a statute, and does not lose that power nor exceed that jurisdiction, regardless of the correctness of its construction. As Mr. Justice Holmes said, speaking for the Court in *Lamar* v. *United States*, 240 U. S. 60, 64–65:

> Jurisdiction is a matter of power and covers wrong as well as right decisions. * * * And nothing can be clearer than that the District Court, which has jurisdiction of all crimes cognizable under the authority of the United States (Judicial Code of March 3, 1911, c. 231,

> § 24, second), acts equally within its jurisdiction whether it decides a man to be guilty or innocent under the criminal law, and whether its decision is right or wrong.

The same concept underlies the decision in *Price* v. *Johnston*, 125 F. 2d 806 (C. C. A. 9), certiorari denied, 316 U. S. 677,[5] where in habeas corpus it was urged that the convicting court lost jurisdiction by an erroneous ruling on the admissibility of evidence alleged to have been illegally seized in violation of the defendant's constitutional rights. In rejecting the argument, the court said (125 F. 2d at 811)—

> When the allegedly illegally procured evidence was offered during the course of the prosecution, and objection was made thereto, it was the duty and the right of the trial judge to rule thereon. The right of a trial judge to make a ruling during the course of a trial carries with it the possibility of ruling wrongly as well as correctly. It is absurd to assert that the jurisdiction of the court hinges upon the mere right or wrong of a ruling on the admissibility of evidence during the course of a trial; that if the court's ruling on an objec-

[5] See also, *Van Meter* v. *Snook*, 15 F. 2d 377 (C. C. A. 5); *Sanford* v. *Robbins*, 115 F. 2d 435, 438 (C. C. A. 5), certiorari denied, 312 U. S. 697; *Cash* v. *Huff*, 142 F. 2d 60 (C. C. A.), certiorari denied, 323 U. S. 747; *Mrozik* v. *Johnston*, 148 F. 2d 149 (C. C. A. 9), certiorari denied, 325 U. S. 878; *Capone* v. *Aderhold*, 2 F. Supp. 280, 283–284 (N. D. Ga.), affirmed, 65 F. 2d 130 (C. C. A. 5).

> tion made be correct, the court continues to retain jurisdiction, but if it errs, the entire proceeding is void. If the trial court erred, and the error was prejudicial, reversal would follow on appeal, as in other prejudicial error, but the mistake would not thereby deprive the trial court of jurisdiction so that the convicted person, thereafter whenever he saw fit, could launch a collateral attack upon a judgment, valid upon its face. * * *

The danger of a contrary view is that every error at a trial, error not deemed sufficiently substantial to warrant taking an appeal, would become clothed with jurisdictional implications. The necessary consequence would be that the writ of habeas corpus would thereby be perverted into what is simply a delayed motion for a new trial, available long out of time, which will forever keep open the prospect that on some later and, it may be, brighter day, the record of trial can be once more reviewed in a more favorable legal climate, and the defendant released from custody for what is then shown to be an error of law on the part of the trial judge. Criminal litigation instead of being speedily terminated would wend its way through the courts via the habeas corpus route long after the time for appeal has expired. See *Capone* v. *Aderhold*, 2 F. Supp. 280, 283–284 (N. D. Ga.), affirmed, 65 F. 2d 130 (C. C. A. 5). Compare *United States* v. *Johnson*, 327 U. S. 106;

United States v. *Smith,* No. 498, this Term. It is true that *Bowen* v. *Johnston,* 306 U. S. 19, cautions against using habeas corpus as a writ of error even where jurisdictional infirmities which could have been urged on appeal, are asserted. But the rule "is not one 'defining power but one which relates to an appropriate exercise of power" (306 U. S. at 27), and the fact that only "exceptional circumstances" will justify issuance of the writ even where the jurisdictional question was open to direct review affords little assurance that a trial which was invulnerable at the time when it was held will not be voided at a later date because of an intervening judicial construction of the statute involved.

The decision by a strong bench (Vinson, Edgerton, and Rutledge, JJ.) of the U. S. Court of Appeals for the District of Columbia in *Warring* v. *Colpoys,* 74 App. D. C. 303, 122 F. 2d 642, certiorari denied, 314 U. S. 678, furnishes an interesting analogy with the situation at bar. Warring was convicted of contempt in 1939 under the doctrine of *Toledo Newspaper Co.* v. *United States,* 247 U. S. 402, in connection with jury tampering. In 1941, after the decision in *Nye* v. *United States,* 313 U. S. 33, overruled the *Toledo Newspaper* case, Warring petitioned for a writ of habeas corpus; he challenged the jurisdiction of the convicting court on the ground that his case was indistinguishable from that of *Nye.* On

the appeal, the Government conceded, and the Court of Appeals agreed, that if Warring's wrongful acts had occurred after the *Nye* decision, the convicting court would have no power to punish him in criminal contempt proceedings. Nevertheless, the Court of Appeals held that the convicting court had not been without jurisdiction. In a carefully reasoned opinion by Mr. Justice Vinson, the court said (74 App. D. C. at 308, 122 F. 2d at 647):

> We believe that appellant is not entitled to discharge upon the habeas corpus writ. The District Court had the power to sentence him in a criminal contempt proceeding in 1939. The *Nye* case of 1941 should not be applied so as to sweep away that power as of 1939. This collateral attack, then, is unavailing. We reject the idea that if a court was considered to have the power in 1939 to do a certain thing under existing statutory construction, and in 1941 that construction is changed so that it no longer has the power to do that thing, it should be concluded that it never had the power in 1939. It has often been said that the living should not be governed by the dead, for that would be to close our eyes to the changing conditions which time imposes. It seems even sounder to say that the living should not be governed by their posterity, for that, in turn, would be downright chaotic.

Similarly, in the present case, when respondent was convicted there was, as the court below so persuasively demonstrates (R. 84), a uniformity of judicial opinion that the finality provision of Section 10 (a) (2) of the Act foreclosed the defense tendered by respondent at the criminal trial. Approximately one year later, this Court decided the *Estep* case. By analogy to the *Warring* decision, it would seem that, while the *Estep* decision now makes plain the fact that the convicting court adopted an erroneous construction of the statute, the jurisdiction of that court must be judged in terms of the understanding of the law in 1945 when respondent was convicted. So judged, there is, of course, no basis for even doubting the court's power.

The view that the erroneous construction of the statute and of the *Falbo* decision is not a jurisdictional defect also rests firmly upon a decision of this Court. In *Collins* v. *Johnston*, 237 U. S. 502, a petition for a writ of habeas corpus was predicated on the claim that the petitioner, who had been convicted for perjury, was deprived of due process because the convicting court refused to consider "a valid and legally conclusive defense," viz., that the false testimony upon which the charge was based was not material to the trial at which it was given. This Court held that the petition for a writ of habeas corpus was properly denied without a hearing, because it

appeared on the face of the petition that the petitioner was not entitled to the writ. In respect of the question whether the convicting court had lost its jurisdiction by rejecting the proffered defense, this Court said (237 U. S. at 506–507):

> Nor are we able to see that the refusal of the proffered defense, even were such refusal erroneous, could at all affect the jurisdiction of the court, or amount to more than an error committed in the exercise of jurisdiction. The averment that the defense was "arbitrarily refused" merely states a conclusion of law, and is of no effect in the absence of facts sufficient to show that the ruling was in truth arbitrary; and no such facts are alleged.[a]

The Fifth Circuit reached the same conclusion in *Rea* v. *McDonald*, 153 F. 2d 190, certiorari denied, 327 U. S. 794, which on its facts is indistinguishable from the instant case. The court below sought to distinguish the *Rea* decision on the ground that it was announced prior to the *Estep* decision and that it therefore assumed that the *Falbo* case foreclosed the defense of misclassification in the criminal trial. It is true that the *Falbo* case was discussed, but the rationale of the Fifth Circuit's opinion, as announced by Judge Sibley,

[a] The Court also concluded, alternatively, that on the merits the asserted defense was not a good one, for the facts did not show that the false testimony was not material to the case in which it was given.

was that if there was error in rejecting the proffered defense, it was reviewable only on appeal (153 F. 2d at 191): "The Oklahoma [convicting] court had jurisdiction of the accused and of the crime charged; and the writ of habeas corpus, as has often been ruled, is not a remedy for errors committed in the trial."

The Fourth Circuit reached the same conclusion in *Sunal* v. *Large*, 157 F. 2d 165, 171, pending on writ of certiorari, No. 535, this Term:

> * * * The defendant was not denied the right to defend against the particular charge that was made, which was his willful refusal to take the induction oath. The adverse ruling on his proffered evidence was, it must now be conceded, a trial error which could and should have been corrected on appeal. But it is a misnomer to say that the trial error caused the court to lose jurisdiction in the case. It resulted in an erroneous judgment but this is far different from an absence of jurisdiction. In rejecting the proffered evidence the trial court evidently acted on its interpretation of the meaning of the "finality" of decision of the Local and Appeal Boards under the Selective Service Act, 50 U. S. C. A. Appendix § 310 (a) (2) and its understanding of the decision of the Supreme Court in the Falbo case. It was called upon to construe and apply the Act. In its ruling, erroneous though it was, the court was exercising a jurisdiction which it undoubt-

> edly had and it cannot properly be said to have "lost jurisdiction" because of the error in exercising it. * * *

See also, *United States ex rel. Lohrberg* v. *Nicholson*, 141 F. 2d 689 (C. C. A. 4), certiorari denied, 322 U. S. 744.

Nor is *Collins* v. *Johnston*, 237 U. S. 502, an isolated decision. In similar circumstances this Court has consistently and persistently rejected arguments that analogous errors of law impaired the jurisdiction of the convicting court. In *Andrews* v. *Swartz*, 156 U. S. 272, the Court held that the convicting court did not lost jurisdiction by its refusal, even if erroneous, to permit the defendant to establish that members of his race were purposefully excluded from the panel of the grand and petit jurors. In *Matter of Moran*, 203 U. S. 96, 105, an asserted violation of the privilege against self-incrimination was held not to have deprived the convicting court of jurisdiction. In *Harlan* v. *McGourin*, 218 U. S. 442, this Court refused to inquire in habeas corpus to determine whether there was any evidence to support the conviction. The exclusion in an extradition proceeding of "impressive evidence of insanity," if error, was held not to be jurisdictional in *Charlton* v. *Kelly*, 229 U. S. 447. The erroneous refusal of the convicting court to allow the defendant compulsory process for the obtaining of his witnesses furnished no basis for habeas

corpus relief in *Ex Parte Harding*, 120 U. S. 782. In *Valentine* v. *Mercer*, 201 U. S. 131, relief by habeas corpus was denied where the convicting court neglected to instruct the jury as to its right to acquit the defendant. A departure from a statutory grant of time in which to prepare for trial was held to be an error of law, but not cognizable in habeas corpus in *McMicking* v. *Shields*, 238 U. S. 99. In *Kaizo* v. *Henry*, 211 U. S. 146, the alleged disqualification of eight grand jurors was held to have rendered the judgment voidable, but not void. In *In re Eckart*, 166 U. S. 481, the Court refused on habeas corpus to discharge a petitioner who was sentenced to imprisonment for first-degree murder, notwithstanding the fact that the jury failed to specify the degree of the crime, the Court pointing out that it was for the trial court to construe the legal meaning of the verdict and that if it erred, this was an error in the exercise of jurisdiction, not one which presented a jurisdictional defect. And in *Felts* v. *Murphy*, 201 U. S. 123, 130, though the Court was moved to remark that "the facts appearing on this record may seem to be somewhat hard," it refused relief by way of habeas corpus to a defendant almost totally deaf, who was unable to hear the testimony at his trial, because it was not repeated to him through an ear trumpet, and who, because of his impecunious condition, could not appeal.

It is plain, therefore, that habeas corpus is not available for the collateral review of errors of law committed by the trial court. Nor does the error here rise to the dignity of a denial of constitutional rights, under the rule of *Bowen* v. *Johnston*, 306 U. S. 19, *Waley* v. *Johnston*, 316 U. S. 101, and related cases.

The suggestion in the opinion below, that the error of the convicting court in the case must be treated as a denial of the right to defend is, as the *Sunal* decision correctly indicates (157 F. 2d at 171), "untenable in its application to the particular case." The fact is that respondent enjoyed every right of defense which our system of judicial procedure guarantees. He was not denied the opportunity to challenge the indictment prior to trial; he participated in the selection of a jury; he cross-examined Government witnesses; he presented defense testimony;[1] he had an opportunity to establish that he did not intentionally violate the statute; he argued his case to the jury; he submitted requested instructions to the court; and in general he enjoyed the very same rights as a defendant that he would receive if he were brought to trial today. There is a substantial qualitative difference between

[1] Compare *Tung* v. *United States*, 142 F. 2d 949 (C. C. A. 1), which illustrates a situation in which the defendant established as a defense that he had not been finally classified because his appeal had not been considered by his board of appeal; his conviction was therefore reversed.

denying a defendant his right to defend and the situation in this case where a defendant in presenting his defense tendered a line of evidence which the trial court in the exercise of its jurisdiction erroneously excluded. The difference was well put by Mr. Justice Cardozo, speaking for the Court in *Escoe* v. *Zerbst*, 295 U. S. 490, 494:

> * * * When a hearing is allowed but there is error in conducting it or in limiting its scope, the remedy is by appeal. When an opportunity to be heard is denied altogether, the ensuing mandate of the court is void, and the prisoner confined thereunder may have recourse to *habeas corpus* to put an end to the restraint. * * * *

Unquestionably, the exclusion of respondent's line of evidence, which was his only substantial defense, was error adversely affecting his rights. But so far as due process of law is concerned, the situation is no different than it would have been if the rejected line of evidence were but one of several defenses tendered by respondent. The fact that respondent relied upon only one defense does not invest with constitutional dignity something that is simply an ordinary trial error. Like *Smith*, *Estep*, *Dodez* and *Gibson*, respondent had an available corrective procedure by appeal which he chose not to pursue. The assertion of "excep-

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*Cf. *Windsor* v. *McVeigh*, 93 U. S. 274, 277, 282-284, where the defendant was denied the opportunity to be heard.

tional circumstances" cannot justify collateral review of a trial error which rendered the judgment voidable, but not void.

In this respect we are unable to agree with the view of the *Sunal* decision (157 F. 2d at 168–169) that although the convicting court's error was not jurisdictional, "exceptional circumstances" justify recourse to habeas corpus. The *Sunal* decision relies upon *Bowen* v. *Johnston*, 306 U. S. 19, 27, but the issue there related to the jurisdiction of the convicting court, and this Court stressed the "exceptional circumstances" involved to justify collateral review of a jurisdictional question which could have been reviewed by appeal. Neither the present case nor the *Sunal* case presents a question going to the jurisdiction of the convicting court; hence, even "exceptional circumstances" cannot inject into the cases the only issue open to collateral inquiry—the power of the convicting court to render the judgment which is attacked.

Respondent's theory here, that habeas corpus is available for the collateral review of the convicting court's trial error, rests on his allegation (R. 7) in the petition for habeas corpus that the entire judicial proceedings, from the indictment through the judgment, are void because founded on an order of the local board which is in excess of the board's jurisdiction. This theory is, of

course, novel; we are aware of no case where a habeas corpus court has gone behind an indictment to inquire into the validity of the administrative action which preceded the judicial proceedings. As we have already pointed out at some length, the jurisdiction of the convicting court here rests on a valid federal statute and on an indictment charging an offense under that statute. But respondent does derive support from a dictum in the *Estep* case—preceded, be it noted, by an "it would seem"—which suggests that habeas corpus might be available after conviction to inquire into the jurisdiction of the local board.

The Court there said (327 U. S. at 123–125):

> If § 11 were not construed to permit the accused to defend on the ground that his local board acted beyond its jurisdiction, a curious result would follow. The remedy of habeas corpus extends to a case where a person "is in custody in violation of the Constitution or of a law * * * of the United States * * *" R. S. § 753, 28 U. S. C. § 453. It has been assumed that habeas corpus is available only after a registrant has been inducted into the armed services. But if we now hold that a registrant could not defend at his trial on the ground that the local board had no jurisdiction in the premises, it would seem that the way would then be open to him to challenge the jurisdiction of the local board

> after conviction by habeas corpus. The court would then be sending men to jail today, when it was apparent that they would have to be released tomorrow.
>
> We do not suggest that because Congress has provided one judicial remedy another should be implied. We may assume that where only one judicial remedy is provided, it normally would be deemed exclusive. But the fact that habeas corpus after conviction is available in these cases gives added support to our reading of § 11. It supports a rejection of a construction of the Act that requires the courts to march up the hill when it is apparent from the beginning that they will have to march down again.

Relying upon the quoted language, both the Fourth (*Sunal* v. *Large*, 157 F. 2d 165) and the Seventh (*Klopp* v. *Overlade*, decided Dec. 27, 1946) Circuits have held that habeas corpus is available after conviction to inquire into the jurisdiction of the local board.

While the Court did not undertake to spell out the reasoning underlying the dictum here in question, we think—and this is also respondent's interpretation—that the rationale of that expression is that the judicial proceedings are void if the local board exceeded its jurisdiction. But the difficulty with both the *Estep* dictum and with respondent's position in the present case is that there is nothing in any of the habeas corpus au-

thorities which permits such a telescoping of the criminal proceedings.

It is true that Mr. Justice Holmes, dissenting in *Frank* v. *Mangum*, 237 U. S. 309, 346, stated that—

> * * * *habeas corpus* cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell.

But the inquiry for which Mr. Justice Holmes argued was one into the criminal trial to determine whether "the processes of justice are actually subverted." 237 U. S. at 347. This is the kind of inquiry which the Court made in the later case of *Moore* v. *Dempsey*, 261 U. S. 86. It is one thing to say that the mob-dominated "trial" considered in *Moore* v. *Dempsey* or the proceeding under review in *Frank* v. *Mangum* was an empty shell; it is quite another to suggest that the judicial proceedings in the convicting court became such because of the trial judge's ruling there. It is tearing words out of context with a vengeance to suggest that Mr. Justice Holmes' dissent in the *Frank* case contemplated an inquiry into administrative proceedings which occurred prior to the commencement of judicial proceedings. Indeed, Mr. Justice Holmes' opinions show a consistent and scrupulous regard for observing

the traditionally limited bounds of the writ of habeas corpus. E. g., *Matter of Moran*, 203 U. S. 96; *Fernandez* v. *Phillips*, 268 U. S. 311; cf. *Lamar* v. *United States*, 240 U. S. 60.

And, as we have already pointed out above, *supra*, pp. 18–19, there is no support in the habeas corpus doctrine of the military cases or the deportation cases cited in footnote 14 of the *Estep* opinion for the dictum now in question. In all of those cases, habeas corpus was the means for obtaining release from custody which rested on an administrative order. None of those cases involved custody based on a judgment of a court. None presented the situation here, where respondent is in custody pursuant to a judgment of conviction, arrived at after a fair trial, and resting on an indictment valid on its face and founded upon a constitutional statute.

It follows that respondent's petition for habeas corpus should have been dismissed.

II

EVEN IF HABEAS CORPUS SHOULD BE HELD TO BE AN AVAILABLE REMEDY UNDER THE *ESTEP* DICTUM, RESPONDENT IS NOT ENTITLED TO BE DISCHARGED UNLESS HE CAN SHOW THAT THE LOCAL BOARD EXCEEDED ITS JURISDICTION IN CLASSIFYING HIM

If, despite the authorities set out in Point I of this brief, the Court should none the less reaffirm the *Estep* dictum, so that habeas corpus is available even after conviction to test the jurisdiction of the local board whose order when disobeyed

occasioned the judicial proceedings, it still does not follow that the judgment below can be affirmed. For what the court below did is in conflict even with the *Estep* dictum.

In support of his contention that the judicial proceedings in the convicting court were void, from indictment through judgment, because founded on an order of the local board in excess of that board's jurisdiction, respondent in his petition for habeas corpus requested the habeas corpus court to inquire into the proceedings before the selective service boards (R. 17–18). The habeas corpus court did so, and concluded that those proceedings were "valid in law and in fact" (R. 72). The court below, however, held that the mere circumstance that respondent's evidence had been excluded in the convicting court voided the conviction, that the habeas corpus court was therefore bound to discharge the respondent forthwith, and that it was not entitled to inquire into the validity of the local board's order.

If the *Estep* dictum is to be followed, we think that the approach of the Fourth and Seventh Circuits in the *Sunal* and *Klopp* cases is to be preferred to that adopted by the Second Circuit below. For the former technique speedily reaches the one basic dispute between the parties—the jurisdiction of the local board—and resolves it. If the dictum in the *Estep* case is to be taken as

establishing the law, then we think it requires that the habeas corpus court must conduct a collateral inquiry into the selective service proceedings to determine whether there is any evidence to support the final classification and whether the registrant was denied any substantial procedural right. This does not mean, as the court below assumed (R. 85–86), that the habeas corpus court is confined to "what chances to be preserved" in the administrative record. We agree with the court below that "anything which in fact tends to establish that the accused did not have a fair hearing" is relevant to an inquiry into the jurisdiction of the local board. See *Eagles* v. *Samuels*, *supra*; slip opinion, p. 7. In our view, however, no reason exists under the theory announced in the *Estep* case why this evidence cannot be initially adduced in the habeas corpus court and considered by that court in determining the jurisdiction of the local board. If the court determines that the local board exceeded its jurisdiction, the writ should be granted, the registrant should be discharged from custody, and there is no occasion for further judicial proceedings. On the other hand, if the habeas corpus court finds against the registrant, he remains in custody to complete his sentence.

Unlike the situation which would exist under the Second Circuit's doctrine, there would be no possibility, as in this case, that a registrant whose

classification is valid would be discharged on habeas corpus without a determination as to the legality of his classification and then be convicted a second time and sentenced anew, possibly receiving no credit for time already served.[9]

Approval of the *Estep* dictum necessarily means that the decision below is erroneous. For while the district court inquired into the jurisdiction of the local board, the circuit court of appeals disapproved of that procedure and did not itself undertake to pass on this question. We submit, therefore, either that the judgment below should be reversed and the case remanded to the circuit court of appeals for consideration of that question, or, in the alternative, that it would be appropriate for this Court to resolve that ques-

[9] Compare the situation in *Klopp* v. *Overlade*, *supra*, where it was urged that the registrant should be discharged from custody, subject to a new trial, without consideration of the question of the jurisdiction of the local board by the habeas corpus court. Prior to the habeas corpus action, on July 17, 1944, Mr. Justice Reed as Circuit Justice had denied in a written opinion an application for bail pending appeal from the judgment of conviction because he concluded after reviewing the evidence that "nothing which has been called to my attention justifies in my view a conclusion that the classification by the local board was arbitrary or beyond their statutory power." Both the district court and circuit court of appeals on habeas corpus rejected the contention of the registrant and inquired into the jurisdiction of the local board, and both courts were convinced that the local board had not exceeded its jurisdiction. Under the Second Circuit's view, the registrant would have been discharged and, it is not improbable, then convicted upon a second trial.

tion at this time, as in *Eagles* v. *Samuels, supra*.[10] See also *Bowen* v. *Johnston*, 306 U. S. 19, 28–30. The latter alternative seems particularly desirable here in view of the fact that a similar issue is before the Court in the *Sunal* case, No. 535, which follows this case an oral argument. We therefore turn to inquire whether the district court erred in concluding that respondent failed to establish that his selective service boards exceeded their jurisdiction.

III

THE DISTRICT COURT CORRECTLY DETERMINED THAT RESPONDENT'S SELECTIVE SERVICE CLASSIFICATION "WAS VALID IN LAW AND IN FACT"

The petition for a writ of habeas corpus (R. 6–19) abounds with allegations which justified issuance of the writ and which, if true, would have required the court to conclude that respondent's board of appeal exceeded its jurisdiction in denying him classification as a minister of religion. As we have shown in the Statement, the writ did issue, petitioner made his returns and

[10] In the *Samuels* case the sole issue before the Court was the propriety of the practice of considering the advisory recommendation of a theological panel. However, as in this case, the selective service file of the registrant was before the Court and even though the Third Circuit had not passed on the question whether there was any evidence to support the classification, this Court did so without remanding the case for consideration of that question by the circuit court of appeals.

a hearing was held in which all the evidence offered by both sides was received. Notwithstanding respondent's abundant offers of proof in the criminal trial and the full allegations of the petition for habeas corpus to the effect that substantial improprieties had occurred in the administrative proceedings, he produced no evidence at the habeas corpus hearing bearing on the legality of the administrative proceedings. Instead, he informed the habeas corpus court that he desired to submit his case on the transcript of the criminal trial and the local board file (R. 38) which were offered in evidence by petitioner.

The transcript of the trial contains some evidence as to the proceedings before the selective service boards and it contains full offers of proof by respondent. However, the Government took the position at the trial that the legality of the administrative proceedings was not an issue, and the trial court, as we have shown, agreed with that view. As a result, the parties were not at issue on the merits of the classification, and the Government made no effort to meet the evidence in this respect which was adduced or offered by respondent. Thus, the only pertinence of the transcript of the trial is to establish that respondent's tendered defense was rejected in the criminal trial.

The only other material evidence in the case is the selective service file.[11] Consequently, the jurisdiction of the local board and the board of appeal must be judged by the facts shown by the file. Those facts are summarized in the Statement, *supra*, pp. 2–5.

Section 5 (d) of the Selective Training and Service Act exempts from military service "Regular or duly ordained ministers of religion." Section 622.44 of the Selective Service Regulations (see 9 F. R. 5202) defines the statutory term as follows:

> (b) A "regular minister of religion" is a man who customarily preaches and teaches the principles of religion of a recognized church, religious sect, or religious organization of which he is a member, without having been formally ordained as a minister of religion; and who is recognized by such church, sect, or organization as a minister.
>
> (c) A "duly ordained minister of religion" is a man who has been ordained in accordance with the ceremonial, ritual or discipline of a recognized church, religious sect, or religious organization to teach and preach its doctrines and to ad-

[11] There is also in evidence the 1943 yearbook of the Watchtower Bible and Tract Society (R. 43) which the petitioner tendered for the purpose of showing that respondent's name was not included in the list of "pioneers" contained in the yearbook.

minister its rites and ceremonies in public worship; and who customarily performs those duties.

In State Director Advice No. 213–B [12] (*infra*, pp. 60–65), the Director of Selective Service advised the personnel of the Selective Service System that the Jehovah's Witnesses sect is a recognized church, religious sect, or religious organization within the purview of the Act and regulations and that in determining in specific cases whether a member of the Jehovah's Witnesses sect is entitled to classification as a minister of religion they should consider, *inter alia*, the following:

> Whether an official of the Jehovah's Witnesses group stands in the same relationship to this group as a regular or duly ordained minister in other religions must be determined in each individual case based upon whether he devotes his life in the furtherance of the beliefs of Jehovah's Witnesses, whether he performs functions which are normally performed by regular or duly ordained ministers of other religions, and finally, whether he is regarded by other Jehovah's Witnesses in the same manner in which regular or duly ordained ministers of other religions are ordinarily regarded.

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[12] This document superseded Opinion No. 14 of the Director of Selective Service, to which reference is made in respondent's selective service file.

We think that the Selective Service System thus has recognized that the religious leaders of the Jehovah's Witnesses sect are entitled to exemption from military service just as the leaders of any other religious group are entitled to classification on IV–D. On the other hand, it is equally clear that the Selective Service Regulations, as construed by State Director's Advice No. 213–B, do not assume that every member of the Jehovah's Witnesses sect shall be exempted from military service. Instead, they contemplate that only those persons who stand in the same relation to the Jehovah's Witnesses sect as recognized ministers in other religions do to their followers shall be classified in IV–D. This view is consistent with the view of the circuit courts of appeal in applying the ministerial exemption to factual situations like that presented in this case. Early in the administration of the Act, Judge Simons speaking for the Sixth Circuit in *Rase* v. *United States*, 129 F. 2d 204, 209, met the question squarely in the following terms:

> The phrase "minister of religion" as used in the Act is to be interpreted according to the intention of the Congress, and not by the meaning attached to it by the members of any particular group. Congress undoubtedly intended to exempt such persons as stand in the same relationship to the religious organizations of which they are members, as do regularly ordained

> ministers of older and better known religious denominations. This is borne out by the provision for the exempting of theological or divinity students. If we understand the appellant's argument, every member of his sect is a minister of religion and so entitled to exemption. No differentiation is to be recognized between shepherd and flock or between pastor and congregants. Followed to its logical conclusion, this would mean that all of the members of any religious group which imposes upon its adherents an obligation to teach and preach its beliefs or to make converts, are exempted under the Selective Service Act without regard to whether such activity constitutes their sole or principal vocation. It is inconceivable that it was the intention of the Congress to incorporate in the Act an exemption so broad and all-embracing. The statutory exemption must be applied in consonance with the clearly apparent purpose of the Congress, and not in response to the interpretation placed upon it by particular religious groups or their adherents.

See also, *Sunal* v. *Large*, *supra*, 157 F. 2d at 175, and cases there cited.

The question which thus remains is whether there is any evidence in the administrative record which supports the appeal board's final determination that respondent was not entitled to classification in IV–D. After an exhaustive

analysis of the facts, the district court concluded against respondent (R. 62–72). Bearing in mind that issues of credibility and of the weight to be given the various items of evidence were for the board of appeal, as the final classifying agency, we think it plain that the district court did not err in its conclusion.

The facts before the board of appeal (see *supra*, pp. 2–5) showed that respondent claimed to have become a minister of religion in 1939 when he was sixteen years old. In 1941, while in this status, he obtained a full-time job as a radio technician with the Radio Corporation of America, and he retained the job until shortly after June 30, 1942, when he registered with his local board. There is evidence that respondent became a "pioneer" in the sect (one who is obligated to devote 150 hours monthly to Jehovah's Witnesses activities) on July 1, 1942, the day following his registration. There is no evidence showing that respondent received training for the ministry other than his statement that he studied the Bible from 1935 to 1939, when he was between the ages of 11 and 16 years old. These facts, coupled with the fact that respondent's name was not included in the list of "pioneers" furnished the Selective Service System by the sect or in the list published in the sect's magazine, "Consolation," which is contained in the file, failed to convince the local board that respondent satisfied his burden of proving

that he was a minister of religion, and he was classified I–A. Thereafter, the local board considered respondent's protest and additional statements from four other Jehovah's Witnesses supporting respondent's claim, and the board changed the classification to IV–D.

It was more than a year later, and only after the board received information from a neighbor that respondent was engaged in secular work as a model and that when he was not doing this he spent most of his time around his home,[13] that the board changed the classification to I–A. Respondent requested another hearing, and he obtained it. And the facts developed confirmed the neighbors' report, at least to the extent of revealing respondent's secular employment as a model, an essential

[13] The court below (R. 86) appears to have been somewhat distressed by the fact that this information was supplied by an identified neighbor who protested the exemption of respondent from service while her three sons were serving under the Act. But it is this very assistance from citizens in the community in which the registrant lives which the decentralized administration of the Act is intended to achieve. By permitting each community to participate in the application of the Act to the members of the community, the Congress insured to the Selective Service System the best efforts of every registrant's neighbors in making sure that all pertinent evidence was before the local board. The fact that material evidence of respondent's secular employment was revealed for the first time by a neighbor demonstrates in one respect the important place of local citizens in effectuating the declaration of Congress "that in a free society the obligations and privileges of military training and service should be shared generally * * *."

fact which he had not communicated to the board. At the hearing, respondent was "evasive" in respect of the board's questions concerning the inconsistency between his efforts to be relieved of service under the act and his secular employment in which he posed in military uniform.

When the local board then refused to change the I–A classification, respondent appealed, and he was permitted to add to the appellate record his statement outlining the basis for his claim to exemption from service. His entire selective service file was before the board of appeal, but the board was not persuaded by respondent's evidence and it refused to classify him in IV–D.

We think it cannot be said from these facts that there is no evidence to support the final classification made by the board of appeal. That board was entitled to regard as persuasive, even though not necessarily conclusive, the facts (1) that respondent was a young boy who had had no specialized religious training in preparation for the ministry other than that which all Jehovah's Witnesses have in studying the Bible; (2) that after respondent claimed to have become a minister, he obtained a full-time secular job as an industrial worker, which he retained until after he registered for the draft; (3) that although there was some evidence that he became a "pioneer" in the sect one day after he registered with his local board, neither the list of "pioneers" furnished the Selec-

tive Service System by the sect [14] nor the list published by the sect in its magazine "Consolation" included respondent's name; (4) that respondent did not inform the local board that he was employed as a model, although at the time he was engaged in this work he was classified as a minister of religion; (5) that the local board thought that his replies to interrogation concerning his secular work were "evasive"; (6) that respondent's claim that he averaged no more than two hours a week in working as a model was not corroborated, although records of his employment undoubtedly were available to him; (7) that a neighbor furnished information that when respondent was not modeling, he was usually at home; and (8) that there is no evidence that respondent performed the functions usually associated with a minister of religion, such as leading the members of the sect in worship, marrying the young, and burying the dead, or that his activities differed in quality from those of any other members of the sect.

While the administrative construction of the ministerial exemption is a broad one, it does not require a classifying board to blind its eyes to

[14] We have been advised by the Selective Service System that it was possible to add names to the list furnished the Selective Service System until October 29, 1942, when the practice was discontinued.

realities. Indeed, State Director Advice No. 213–B (*infra*, p. 64) cautions the boards that—

> Experience has shown that due to the fact that a large proportion of the members of any Jehovah's Witnesses unit claim to be ministers, special care must be used in applying the above-mentioned tests. Information presented in the case of a registrant who claims to be a minister of the Jehovah's Witnesses group must show facts regarding both his ministerial position and his ministerial activities which clearly justify his exemption as a minister. Certificates, affidavits, or statements of opinion are not necessarily conclusive proof of a ministerial status.

Tested in this light, we think the board of appeal could reasonably have concluded that respondent is a devout member of the Jehovah's Witnesses sect, but that is all. The evidence before the board did not require the conclusion that respondent has devoted his life to the furtherance of the beliefs of the Jehovah's Witnesses, or that he performs the functions which are performed by regular or duly ordained ministers of other religions, or that his status in the sect in relation to other members of the sect is the same as that of a minister of his congregation in the other religious groups. Unless the board so found the facts, respondent was not entitled to classification in IV–D (see *infra*, p. 63). In these circum-

stances it obviously cannot be said that the board flouted the command of Congress in denying respondent an exemption as a minister of religion. The judicial inquiry probes no further. See *Eagles* v. *Samuels, supra,* slip opinion, p. 12.

CONCLUSION

For the foregoing reasons, the judgment of the circuit court of appeals should be reversed and respondent remanded to petitioner's custody.

Respectfully submitted.

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Acting Solicitor General.
THERON L. CAUDLE,
Assistant Attorney General.
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MARCH 1947.

APPENDIX

1. The Selective Training and Service Act of 1940, 54 Stat. 885, 57 Stat. 597, 50 U. S. C. Appendix 301–318, provides in part, as follows:

SEC. 5. * * *

(d) Regular or duly ordained ministers of religion, and students who are preparing for the ministry in theological or divinity schools recognized as such for more than one year prior to the date of enactment of this Act, shall be exempt from training and service (but not from registration) under this Act.

* * * * *

SEC. 10. (a) The President is authorized—

(1) to prescribe the necessary rules and regulations to carry out the provisions of this Act;

(2) to create and establish a Selective Service System, and shall provide for the classification of registrants and of persons who volunteer for induction under this Act on the basis of availability for training and service, and shall establish within the Selective Service System civilian local boards, civilian appeal boards, and such other agencies, including agencies of appeal, as may be necessary to carry out the provisions of this Act. There shall be created one or more local boards in each county or political subdivision corresponding thereto of each State, Territory, and the District of Columbia. Each local board shall consist

of three or more members to be appointed by the President, from recommendations made by the respective Governors or comparable executive officials. No member of any such local board shall be a member of the land or naval forces of the United States, but each member of any such local board shall be a civilian who is a citizen of the United States residing in the county or political subdivision corresponding thereto in which such local board has jurisdiction under rules and regulations prescribed by the President. Such local boards, under rules and regulations prescribed by the President, shall have power within their respective jurisdictions to hear and determine, subject to the right of appeal to the appeal boards herein authorized all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this Act of all individuals within the jurisdiction of such local boards. The decisions of such local boards shall be final except where an appeal is authorized and is taken in accordance with such rules and regulations as the President may prescribe. Appeal boards within the Selective Service System shall be composed of civilians who are citizens of the United States. The decision of such appeal boards shall be final in cases before them on appeal unless modified or changed by the President as provided in the last sentence of section 5 (1) of this Act. * * *

* * * * * *

SEC. 11. Any person * * * who in any manner shall knowingly fail or neglect to perform any duty required of him

> under or in the execution of this Act, or rules or regulations made pursuant to this Act * * * shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine or not more than $10,000, or by both such fine and imprisonment, * * *.

2. The habeas corpus statute (R. S. §§ 753, 761, 28 U. S. C. 453, 461) provides:

> SEC. 753. The writ of habeas corpus shall in no case extend to a prisoner in jail unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the Constitution or of a law or treaty of the United States; or, being a subject or citizen of a foreign State, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign State, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify.
>
> * * * * * *
>
> SEC. 761. The court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require.

3. State Director Advice (No. 213–B) provides in pertinent part, as follows:

> STATE DIRECTOR ADVICE (No. 213–B)
> Issued: 6/7/44.
> As Amended: 9/25/44.
>
> Subject: The Ministerial Status of Certain of the Officials of Specified Churches, Religious Sects, or Religious Organizations
>
> INTRODUCTION
>
> Concerning the classification of registrants who claim to be ministers of religion, section 622.44, Selective Service Regulations, provides as follows:
>
> "(a) In Class IV–D shall be placed any registrant:
>
> (1) Who is a regular minister of religion, or
>
> (2) Who is a duly ordained minister of religion, or * * *.
>
> "(b) A 'regular minister of religion' is a man who customarily preaches and teaches the principles of religion of a recognized church, religious sect, or religious organization of which he is a member, without having been formally ordained as a minister of religion; and who is recognized by such church, sect, or organization as a minister.
>
> "(c) A 'duly ordained minister of religion' is a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect, or religious organization, to teach and preach its doctrines and to administer its rites and ceremonies in public worship; and who customarily performs those duties."

Part I

1. Because of the unusual nature of the organization and work of certain religious groups, National Headquarters has been called upon, from time to time, to make predeterminations relating to the question of whether a particular group comes within the purview of the Regulations as a recognized church, religious sect, or religious organization.

2. The issuance of a complete list of recognized churches, religious sects, or religious organizations, is not contemplated by this Headquarters. Therefore, the fact that a particular organization is not mentioned in this State Director Advice should not be taken to mean that it is not a recognized church, religious sect, or religious organization.

3. Information will be furnished upon request of any agency of the Selective Service System as to whether a predetermination has been made regarding any particular organization. If no predetermination has been made, a study will be conducted and a predetermination made.

Part II

1. Statements of opinion have been issued occasionally regarding the nature and work of those offices or positions of leadership in a recognized church, religious sect, or religious organization which are generally recognized to be ministerial in nature and function.

2. In Part IV of this State Director Advice is listed information relating to certain offices of ministerial function in various organizations. Each organization referred

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to has been predetermined by National Headquarters to be a recognized church, religious sect, or religious organization within the purview of the Act and the Regulations. The offices of ministerial function of such groups as indicated have been predetermined by National Headquarters to come within the meaning of the Act and the Regulations as offices of regular or duly ordained ministers of religion.

3. The following are the recognized churches, religious sects, or religious organizations concerning which statements of opinion are issued in Part IV of this State Director Advice:

(a) Salvation Army.

(b) Holy Roman Catholic Church—Lay Brothers.

(c) Jehovah's Witnesses.

(d) Church of Christ, Scientist.

(e) Evangelical Lutheran Synod of Missouri, Ohio, and Other States—Christian Day School Teachers.

(f) Evangelical Lutheran Joint Synod of Wisconsin and Other States—Christian Day School Teachers.

(g) Jewish Congregations—Cantors.

(h) Volunteers of America.

(i) Church of Jesus Christ of Latter Day Saints (Mormon).

(j) Seventh-day Adventist Church—Colporteurs and Day School Teachers.

Part III.

1. Whether a registrant who qualifies under the statements hereinbefore made, is actually engaged in the regular discharge of his duties as a regular or duly ordained minister of religion must be determined in

each individual case by the local board or agency of appeal.

2. It is the opinion of National Headquarters that the question of the regular discharge of his duties as a minister is a most important factor in determining whether a registrant should be classified in Class IV–D in accordance with the provisions of paragraphs (b) and (c) of section 622.44 of the Regulations.

3. The historic nature of the ministerial function of a registrant's own religious organization must be taken into consideration in each individual case. In some religious organizations both practice and necessity require the minister to support himself, either partially or wholly, by secular work.

4. In view of the fact that the exemption of regular or duly ordained ministers of religion is a statutory provision of the Act, no particular form of document is specified for the presentation of information concerning such status.

* * * * *

3. Jehovah's Witnesses

Whether an official of the Jehovah's Witnesses group stands in the same relationship to this group as a regular or duly ordained minister in other religions must be determined in each individual case based upon whether he devotes his life in the furtherance of the beliefs of Jehovah's Witnesses, whether he performs functions which are normally performed by regular or duly ordained ministers of other religions, and finally whether he is regarded by other Jehovah's Witnesses in the same manner in which regular or duly ordained

ministers of other religions are ordinarily regarded.

Experience has shown that due to the fact that a large proportion of the members of any Jehovah's Witnesses unit claim to be ministers, special care must be used in applying the above-mentioned tests. Information presented in the case of a registrant who claims to be a minister of the Jehovah's Witnesses group must show facts regarding both his ministerial position and his ministerial activities which clearly justify his exemption as a minister. Certificates, affidavits, or statements of opinion are not necessarily conclusive proof of a ministerial status.

Members of the Bethel Family are those members of Jehovah's Witnesses who devote their full time and effort to the manufacture and production of books, pamphlets, and supplies for the religious benefit of Jehovah's Witnesses, the purpose of which is to present the beliefs of Jehovah's Witnesses and to convert others. For their religious services, the members of this group are said to receive their subsistence and lodging and in addition a very modest monthly allowance. This group of individuals consists of the office and factory workers at 117 Adams Street, Brooklyn, New York, and workers in the executive offices at 124 Columbia Heights, Brooklyn, New York, and at the Farms.

Pioneers of Jehovah's Witnesses are those members of Jehovah's Witnesses who devote all or substantially all of their time to the dissemination of the tenets and beliefs of Jehovah's Witnesses.

A certified official list of members of the Bethel Family and Pioneers has been transmitted to the State Directors of Selective Service by National Headquarters as an attachment to State Director Advice No. 213–C. The members of the Bethel Family and Pioneers whose names appear upon such certified official list were thought at the time the list was issued to come within the purview of section 5 (d) of the Selective Training and Service Act of 1940, as amended, and if they have continued in the same status, they should be classified in Class IV–D. The status of members of the Bethel Family and Pioneers whose names do not appear upon such certified official list shall be determined as herein provided.

Other members of Jehovah's Witnesses, known by the various names of servant to the brethren, company servant, assistant company servant, backcall servant, territory servant, advertising servant, account servant, stock servant, and other servants, devote their time and effort in varying degrees to the dissemination of the tenets and beliefs of Jehovah's Witnesses. Servants to the brethren and company servants are believed to hold positions of greater responsibility and leadership than the other servants mentioned; however, the status of all of these "servants" should be determined as herein provided.

* * * * * *

4. One of the latest expressions of the Selective Service System concerning the exemption of Jehovah's Witnesses from military service as ministers of religion is contained in a communi-

cation of July 15, 1946 from the Selective Service System to the General Counsel of the sect, as follows:

JULY 15, 1946.

3–164

Mr. HAYDEN COVINGTON,
117 Adams Street,
Brooklyn, New York.

Subject: Status of Regular or Duly Ordained Ministers of Religion

DEAR MR. COVINGTON: Reference is made to your letter of April 23, 1946, addressed to us regarding the above-mentioned subject with specific reference to the classification of registrants who claim to be ministers of Jehovah's Witnesses. We have noted the statements and comments which you made, and will discuss our position relative to the general subject and also to the specific issues which you have raised.

A study of the legislative history back of the adoption of the Selective Training and Service Act indicates the members of Congress who were concerned with the matter were cognizant of and generally approved the provisions adopted for the exemption of ministers of religion during World War I. For instance, Senator Guffey speaking on the floor of the Senate regarding the amendment which he presented on August 19, 1940, and which embodied much the same wording as that finally adopted, said, "Mr. President, that is the same provision which was included in the Selective Draft of 1917. I think in times like this it is necessary to protect the church as much as any other activity."

It is interesting therefore to note the language used in 1917. The Selective Service Law, approved May 17, 1917, provided in pertinent part:

> "SEC. 4. * * * regular or duly ordained ministers of religion * * * shall be exempt from the selective draft herein provided * * *"

It was then provided in the Selective Service Regulations, Classification Rules and Principles, that:

> "SECTION 79. Class V—Miscellaneous.
> "RULE XLI. In Class V shall be placed any registrant found to be—
> "(a) * * *
> * * * * * *
> "(b) A regular or duly ordained minister of religion.
>
> "NOTE 1.—A duly ordained minister of religion is a person who has been ordained, in accordance with the ceremonial, ritual, or discipline of a church, religious sect, or organization established on the basis of a community of faith and belief, doctrines and practices of a religious character, to preach and to teach the doctrines of such church, sect, or organization and to administer the rites and ceremonies thereof in public worship, and who as his regular and customary vocation preaches and teaches the principles of religion and administers the ordinances of public worship as embodied in the creed or principles of such church, sect, or organization.
>
> "A regular minister of religion is one who as his customary vocation preaches and teaches the principles of religion of a church, a religious sect, or organization of which he is a member, without having been

formally ordained as a minister of religion, and who is recognized by such church, sect, or organization as a regular minister.

"The words 'regular or duly ordained minister of religion' do not include a person who irregularly or incidentally preaches and teaches the principles of religion of a church, religious sect, or organization, nor do the words include a person who may have been duly ordained a minister in accordance with the ceremonial rite, or discipline of a church, religious sect, or organization, but who does not regularly, as a vocation, preach and teach the principles of religion and administer the ordinances of public worship as embodied in the creed or principles of his church, sect, or organization."

We have been mindful that it has been stated in Section 1 of the current Act that "it is imperative to increase and train the personnel of the armed forces of the United States," as well as that it appeared to be the intent of Congress "to protect the church as much as any other activity" through "exempting actual ministers." This last phrase is taken from an expression of Senator Walsh made on the floor of the United States Senate on August 19, 1940. We quote him more fully, but not completely, as follows:

"The difficulty with an amendment of this kind, assuming we all agree to the principle that ministers of the gospel should be exempted, is where the line should be drawn between clergymen who are temporarily engaged as clergymen and religious students who are only part-time students. So far as I am concerned and so far as the representatives of religion who have conferred

with me are concerned, we are very strongly of the opinion that the amendment should have no loopholes in it, and that only ministers of the gospel and actual students who are engaged in giving all their time in preparation for religious work should be exempted.

"The regulations of the War Department which were promulgated in 1917 were in every way satisfactory to these religious groups; and I think the Senator from Colorado, in drafting his amendment, had in mind the language that was used in the law of 1917 and had in mind the expectations that the War Department would promulgate the same regulations if the pending bill should be enacted.

"As I understand, there was in the committee unanimity of opinion in favor of exempting actual ministers of the gospel who are actually performing ministerial and religious duties."

Taking into consideration both the individual and his church, we believe that there are two factors, sometimes overlapping, which may indicate that a man is a minister of religion. The first of these is the religious leadership which a man may demonstrate in his church. Some men have positions of considerable influence and demonstrate qualities of leadership. In other instances the part that a man plays in the church will be less influential but he will show himself to be a minister by devoting his life to the work of his church. Some devote their lives to the ministry to the extent of abstaining from many pleasures of the world and renouncing personal gain in a singleness of devotion to the task which they have accepted.

We believe that whether an official of the Jehovah's Witnesses is to be recognized as a regular or duly ordained minister must be determined in each individual case based not only upon whether he is regarded by other Jehovah's Witnesses as a minister of religion but also upon whether he performs functions which are those generally recognized as religious and ministerial functions normally performed by regular or duly ordained ministers of religion and the extent to which he devotes his life to the furtherance of your beliefs.

From time to time you have furnished us helpful information regarding the organization of the Watchtower Bible and Tract Society. From this information we have gained the impression that many of your Company Servants and Servants to the Brethren hold positions of considerable religious leadership within the organization. We have felt that the demonstration of this leadership may qualify a man to be considered a minister of religion by Selective Service. Where this has been sufficiently demonstrated, we have taken administrative action with a view of having additional consideration given to the question of the man's classification in Class IV-D. This has been done without regard to the question of the registrant's having been engaged in certain secular employment.

We mention this because it appears that you feel undue consideration has been given by Selective Service to the secular employment engaged in by certain Jehovah's Witnesses. We emphasize the fact that in our opinion the controlling factor

in the final analysis of any case wherein a man claims to be a minister is the question of his ministerial work and not that of his secular employment. However, information indicating that a man who claims to be a minister is engaged in secular employment may raise a question regarding the extent that secular employment crowds out and precludes ministerial activities.

We understand that members of the Bethel Family are those members of Jehovah's Witnesses who devote their full-time and effort to the manufacture and production of books, pamphlets, and supplies for the religious benefit of Jehovah's Witnesses, the purpose of which it to present the beliefs of Jehovah's Witnesses and to convert others. For their religious services, the members of this group are said to receive their subsistence and lodging and in addition a very modest monthly allowance.

From this information it appears to us that the members of the Bethel Family stand in a relation to your church similar to that of the minor clergy of some other churches who have devoted their lives to religious service. Their cases should be decided on the basis of the extent to which they demonstrate their devotion of time and effort to their church.

Other members of Jehovah's Witnesses may be judged also by either of these standards. However, it would appear that most of them must be judged on the basis of the extent to which they have devoted their lives to the work of your church. Regarding this we have set no standard number of hours in religious work as a standard,

although you have stated to us that a "Pioneer is required to devote a specified minimum of 150 hours per month to his ministerial duties." You have also told us that "there are also a number of special Pioneers. These are required to devote 175 hours per month to their work * * *."

We had thought that you fully understood our viewpoint to the effect that a registrant who had been a minister of religion forfeited his right to that classification if he did not continue in his ministerial work. For instance on July 3, 1945, you wrote to us concerning one Lloyd Raymond Browne, concerning whom we had previously inquired, and stated:

> "This registrant relinquished his full-time status as a minister and dropped back to part-time status on May 24, 1944, indicating that he desired to return to full-time status later on. Inasmuch as he has not again taken up his full-time status, no objection is registered to his being removed from the certified official list of full-time ministers."

We note also in this connection your letters of March 19, 1946, and April 10, 1946, regarding the case of one Anthony Thomas Raman. In your letter of March 19, 1946, you stated:

> "In view of the fact that Mr. Raman has been serving as a pioneer minister since July 1, 1945, in addition to serving previously during his school work, and since he has filed adequate information showing his ministerial status, it is respectfully requested that your Headquarters have his Cover Sheet sent to your Headquarters

for review, looking to a presidential appeal in behalf of his IV–D claim."

In this letter you stated also that this man had accepted a part-time secular job as a luncheon club waiter. Largely because of that, we requested additional information regarding the nature and extent both of his religious and ministerial activities and of his secular employment. With respect to his ministerial work, the report which you furnished us indicated that he had actually met your standard of "a specified minimum of 150 hours per month" only in August and September of the period specified in your first letter. At this time you stated:

"His time reported to the Headquarters of the Society is as follows:

	Hours		Hours
May 1945	133	October	132
June	150	Nov. 1945	*100
July	138	December	*100
August	153	Jan. 1946	110
September	151	February	106
		March	87

*Ill

As we have stated hereinbefore, we have not accepted your specified number of hours of work for a Pioneer as a standard of work for a member of the minor clergy. But where one of your men fails in meeting that quota, for reasons other than sickness, we feel that no good reason exists for us to take action with a view of procuring a IV–D classification for the man. Accordingly, we informed you that no further action was contemplated in this case.

All information available should be given full and careful consideration in such a case in order to determine the man's proper classification.

While appointment credentials and personal testimonials are helpful, they are not necessarily conclusive and where there is a reasonable doubt regarding a case, complete factual information should be procured in order to determine the real extent to which the man has demonstrated his devotion to the work of his church.

We trust that by the foregoing we have explained how we have tried to give those of your organization who claim to be ministers of religion proper consideration. If the man demonstrates through his religious and ministerial work that he holds a position of leadership in your church and that his exemption "is necessary to protect the church" or if the man demonstrates that he has consecrated his life to religious service, we feel that he is entitled to classification in Class IV–D and exemption from training and service. However, these are matters which must be currently demonstrated in the case of any given registrant.

Should you have any further comments which you may wish to make regarding this matter, they will be given careful consideration.

For The Director,

NEAL M. WHERRY,
Major, AUS,
Chief, Legal and Classification Section,
Camp Operations.

U. S. GOVERNMENT PRINTING OFFICE: 1942

No. 840

In the Supreme Court of the United States

OCTOBER TERM, 1946

MYRL ALEXANDER, WARDEN, PETITIONER

v.

UNITED STATES EX REL. JOHN MYRON KULICK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

If the Court holds that the habeas corpus court had power to inquire into the jurisdiction of the selective service boards, there is presented an additional question which is not discussed in petitioner's opening brief, and which therefore requires reply.

As one basis for attacking the jurisdiction of the board of appeal, respondent urges that there is no evidence to support the refusal of the board to classify him as a minister, and our opening brief answers this argument. But respondent also urges that the local board deprived him of a "full and fair hearing," because "the undis-

puted evidence showed that the local board failed to reduce to writing and place in the prisoner's file[1] vital oral evidence submitted by him at a personal appearance [on August 30, 1944] relative to his status under the Act" (Br. 131).

Respondent here made no such allegation in his petition for a writ of habeas corpus, nor, as the record before the habeas corpus court indicates, did he adduce any such proof at the habeas corpus hearing. Indeed, the only evidence adduced at the habeas corpus hearing bearing on the administrative proceedings was the selective service file and that was submitted by the petitioner (R. 40). There is nothing in the file which shows that respondent adduced oral evidence before the board which was not summarized in writing.

---

[1] Section 623.2 of the Selective Service Regulations (9 Fed. Reg. 437–439) provides:

"* * * The registrant's classification shall be made solely on the basis of the Selective Service Questionnaire (Form 40), Affidavit of Dependent Over 18 Years of Age (Form 40A), Affidavit—Occupational Classification [General] (Form 42), or Affidavit—Occupational Classification [Industrial] (Form 42A), and such other written information as may be contained in his file * * *. Oral information should not be considered unless it is summarized in writing and the summary placed in the registrant's file. Under no circumstances should the local board rely upon information received by a member personally unless such information is reduced to writing and placed in the registrant's file."

Section 627.13 (b) (8 Fed. Reg. 16720) provides, *inter alia*, that "if any facts considered by the local board do not appear in the written information in the file, the local board shall prepare and place in the file a written summary of such facts."

For the purpose of enabling the habeas corpus court to know "what has gone on in the Southern District of New York," petitioner also placed in evidence a transcript of the proceedings in the criminal trial (R. 37–39). While the transcript has probative value in showing the proceedings in the criminal trial and is material to the issue whether the convicting court deprived respondent of his right to defend, the testimony at the trial, of course, is of no probative value in the habeas corpus proceeding in respect of the proceedings before the selective service boards.

Respondent, however, seems to have assumed that the evidence adduced in the criminal trial is also evidence in the habeas corpus proceeding, notwithstanding that the witnesses did not appear in the habeas corpus court. Respondent's statement refers liberally to facts which were adduced only in the criminal proceeding, and his contention that the local board failed to reduce oral evidence to writing similarly rests only upon testimony adduced at the criminal trial.

Thus, at the criminal trial a member of the local board was called as a defense witness and he was interrogated concerning the hearing before the board on August 30, 1944. He testified (Tr. 68–69) that when the board reclassified respondent from IV–D to I–A, it did not act arbitrarily, and that thereafter on August 30, 1944—

> The boy appeared before the board, and in his own way we asked him what he did,

> and he told us he was a professional model which required him to wear the United States Army uniform at times. We asked him, as I recall, how much time he gave to his ministerial duties, and the time he gave and the time he spent in making his livelihood did not jibe, so we concluded that most of his time was spent working as a professional model and very little time given to his duties as a minister.

It appears from the selective service file that at the conclusion of the August 30 hearing the board placed the following statement in the file:

> When registrant appeared it was learned after interrogation that he was an artist model—and has been photographed in military uniform; when further questioned concerning C. O. in military uniform his reply was evasive.

When respondent took the witness stand at his criminal trial, he testified (Tr. 106–119) that he had furnished extensive oral information to the board at the August 30 hearing, including information concerning the activities of the Jehovah's Witnesses Sect, his activities within the sect, the scriptures upon which he predicated his ministerial claim, his work as a model, and the reasons why his name was not included on the list of ministers furnished the Selective Service System by the Watchtower Bible and Tract Society. The Government previously had

urged, and the court agreed, that the defense of illegal classification was not open to respondent in the criminal trial; accordingly the Government did not cross-examine respondent concerning this testimony and did not adduce evidence in answer to respondent's testimony in this respect.

On this state of the record in the criminal trial respondent now contends (Br. 131–137) that he has established that the local board failed to summarize in writing all of his oral statements at the board hearing, and that it therefore deprived him of procedural due process. In our view, if respondent desired to make this contention, it was his responsibility to allege it in his petition for a writ of habeas corpus and to adduce direct proof in the habeas corpus court in support of his allegations. The present attempt to rely upon his testimony at the criminal trial as though the same testimony had been given at the habeas corpus hearing is without justification. Quite plainly, the record of the criminal trial does not reflect a complete picture of the events before the board on August 30; it shows only respondent's version. For the matter was not in issue in the criminal trial and the prosecution therefore made no effort to answer respondent's evidence.

Similarly, in the habeas corpus proceeding the petition did not place in issue the question

whether the board failed to reduce oral evidence to writing and petitioner, of course, made no effort to answer an issue which was not there. It is true that the opinion of the habeas corpus court refers to the facts shown by the transcript of the criminal trial and rejects respondent's contention (R. 69), but the court was no more warranted in deciding an issue on which there was no direct evidence before it than is respondent in relying on his testimony at the criminal trial.

Even assuming, *arguendo*, that the question is open on the present record, we think respondent's contention must fail. For, if the memorandum of the August 30 hearing (*supra*, p. 4) is inaccurate, the inaccuracy was subsequently cured by respondent. As we point out in our main brief (p. 5), Section 627.12 of the Selective Service Regulations provides that a registrant who takes an appeal to his board of appeal—

> may attach to his notice of appeal or to the Selective Service Questionnaire (Form 40) a statement specifying the respects in which he believes the local board erred, may direct attention to any information in the registrant's file which he believes the local board has failed to consider or give sufficient weight, and may set out in full any information which was offered to the local board and which the local board failed or refused to include in the registrant's file.

When respondent took his appeal to the board of appeal he availed himself of this privilege. On September 8, 1944, he submitted a statement on appeal setting forth the various considerations in support of his claim to exemption as a minister of religion. It is a fair assumption that respondent's statement on appeal presented his case to the board of appeal in the light most favorable to him and included such information as respondent believed vital to his claim. Thus, the information which respondent relies upon was before the board of appeal, and there is nothing in the record which suggests that it was not fully considered by the board of appeal. If the local board failed to reduce to writing oral evidence furnished by respondent, the defect is at the very worst a mere technical deficiency. For the information found its way into the record through the statement on appeal which respondent filed. Respondent thus has not suffered a procedural irregularity "of such a nature or magnitude as to render the hearing unfair." See *Eagles* v. *Samuels*, No. 59, this Term, decided December 23, 1946.

The Fourth Circuit has rejected the argument that the failure to file a statement on appeal constitutes a failure to exhaust an available administrative remedy. *Smith* v. *United States*, 157 F. 2d 176, 183, certiorari denied, November 12, 1946 (No. 534, this Term). But the present case is one where the registrant availed himself of the

remedy and thereby cured what might have been a defect in the administrative record:

Respectfully submitted.

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FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 840

MYRL E. ALEXANDER, WARDEN
Petitioner

v.

UNITED STATES OF AMERICA ex rel.
JOHN MYRON KULICK
Respondent

ON CERTIORARI TO
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 535

THEODORE MARTIN SUNAL
Petitioner

v.

DAVID R. LARGE, SUPERINTENDENT
Respondent

ON CERTIORARI TO
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOINT BRIEF FOR RESPONDENT KULICK AND PETITIONER SUNAL

HAYDEN C. COVINGTON
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SUMMARY OF JOINT ARGUMENT

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ONE

Refusal by the sentencing courts to permit prisoners to make their defenses to the indictments and the holding that it was necessary for prisoners to submit to induction and thereafter apply for writs of habeas corpus as the only remedy were denials of judicial trials and fundamental constitutional rights contrary to the due process clause of the Fifth Amendment to, and the bill of attainder clause of, the Constitution so as to make the convictions subject to collateral attack on habeas corpus 32-55

A

The history and express provisions of the Constitution securing the writ of habeas corpus and the statutes implementing the guarantee have been given a liberal interpretation so as to permit a broad scope of inquiry in determining the legality of custody 32-35

(1) The writ of habeas corpus grew out of abuses of the criminal process in England 32-33

(2) Legislation to and including the Habeas Corpus Act in England 33

(3) History of legislation implementing the guarantee of the writ of habeas corpus in the Constitution 33-34

(4) The latest Act of Congress has expanded the scope of inquiry on the writ of habeas corpus 34-35

B

The denial of prisoners' defenses as a result of the unconstitutional construction placed upon the Act was a denial of fundamental rights contrary to the due process clause of the Fifth Amendment to, and the bill of attainder clause of, the Constitution, making the judgments subject to collateral attack on habeas corpus 35-55

(1) While judgments are usually impervious to collateral attack the denial of a constitutional right makes them subject to such attack 35

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ONE (B) *Continued*

(2) The prisoners were denied the right to challenge validity of the draft board orders because of an illegal holding that the orders could not be questioned in criminal proceedings under the Act 35-36

(3) The denial of such defenses was so extraordinary as to make the writ of habeas corpus available requiring the court to decide whether the action condemned in *Estep* and *Gibson* constituted a violation of the Constitution 36-37

(4) The denial of a right to be heard on a defense constitutes a violation of the Constitution requiring due process of law and a judicial trial 37

(5) The illegal construction of the statute was not a mere error of law but was an egregious denial of constitutional rights so grievous as to make the judgment subject to collateral attack 37-38

(6) The denial of prisoners' rights to challenge the orders in response to the indictments was a denial of a judicial trial, violating the express provisions of the Constitution prohibiting bills of attainder and bills of pains and penalties 38-39

(7) Many cases of this court have held that where a defendant in a criminal case is denied the right to be heard on a material defense such is a violation of due process of law 39-42

(8) The denial of due process of law to the prisoners upon their criminal trials opened the judgments to collateral attack on habeas corpus 42-44

(9) Since the denial of the right to be heard on an issue or defense in an administrative proceeding makes the administrative order subject to collateral attack, then for the same reason the judgment of the court should be subject to such attack 44-47

(10) Inasmuch as the denial of the rights to be heard upon the criminal trials constituted a violation of the Constitution the failure to urge them upon direct appeal cannot be considered as a waiver 47-48

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ONE (B) *Continued*

(11) The challenge that Section 11 of the Act has been construed and applied by the courts in such a manner as to make it unconstitutional requires the habeas corpus courts in these cases to inquire collaterally as to the validity of the proceedings 48-49

(12) The deprivation of the right of the prisoners to be heard in their defenses constituted an ouster of the authority or jurisdiction of the convicting courts to pronounce sentence 49-50

(13) Since the judgments to be reviewed are not convictions of state courts the cogent reasons of comity do not intervene to restrict or limit the review upon the writ of habeas corpus 50

(14) Previous decisions in cases where review of convictions of prisoners under the Act by way of writ of habeas corpus have been denied are not applicable here 51-52

(15) The case of *Collins* v. *Johnston* is not in point and has been materially weakened by other and more recent decisions 51-54

(16) The decision in *Rea* v. *McDonald* which this Court refused to review on writ of habeas corpus may be rejected as erroneous 54-55

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TWO

Extraordinary and unusual circumstances in the law existed at the time of the convictions of these prisoners in these cases, justifying their failure to appeal and warranting their use of the writs of habeas corpus as a substitute for appeal, to review the unconstitutional denial of the defenses in the criminal trials of the prisoners 56-68

(1) From the incipient stages of the illegal construction, to the crisis of the Falbo decision, and up to partial recovery by the Estep decision, the inferior federal courts held that draft board orders could not be challenged in prosecutions under the Act 56-58

(2) The mountain of erroneous dicta in all of the decisions of the inferior federal courts and the denial of certiorari by this court for unknown reasons excused the prisoners in these cases from appealing 58-59

(3) The extraordinary circumstances of these cases make appropriate the use of the writ of habeas corpus to determine the validity of the proceedings in the convicting courts in these cases 59-60

(4) The decisions are uniform in holding that where there is a denial of a right expressly guaranteed by the Constitution the error is so grave as to be reached on habeas corpus irrespective of the right to raise the question upon direct appeal 60-62

(5) The various decisions relied upon by the Government which hold that habeas corpus is not available in cases of erroneous rulings by convicting courts are not in point because they did not involve the denial of rights expressly guaranteed by the Constitution 62-63

(6) The failure to take appeals for any reason in cases where there has been the denial of constitutional rights is not ground for refusal of discharge on writ of habeas corpus 63-64

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TWO *Continued*

(7) The situation that existed in the *Warring* v. *Colpoys* case, where the change in statutory construction was held to be insufficient ground for discharge on writ of habeas corpus, is entirely different from the situation here because there was no change in the decisions of this court and the question presented here is a denial of procedural due process rather than a contention that upon the facts the prisoners are not guilty 64-68

THREE

The scope of inquiry on the disposition of the writs of habeas corpus in these cases properly ought to extend to a determination of the validity of the draft board proceedings only in event this Court concludes that the illegality of the proceedings in the convicting courts is not sufficient to justify a discharge of the prisoners 68-83

(1) The prisoners made two attacks against the judgments, one being against the proceedings in the convicting courts and the other being against the proceedings before the draft boards 68

(2) The prisoners have consistently contended throughout the proceedings in the courts below that orderly procedure does not require the habeas corpus court to pass upon the validity of the draft board proceedings if the courts conclude that the convicting courts violated prisoners' rights 69

(3) The Government has strenuously urged in the courts below that the only question available for review upon these habeas corpus proceedings is the validity of the draft board proceedings. The Government has continuously argued that the validity of the proceedings in the criminal courts was entirely immaterial if the draft board proceedings are considered . 66-70

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THREE *Continued*

(4) The Government has altered its position in this court and now contends that review of the draft board proceedings to determine the validity of the detention of the prisoners is a novel proposition without support of law 70-71

(5) The district courts and the court of appeals in the *Sunal* case erred in holding that the denial of the right to be heard is harmless error because of the validity of the draft board proceedings 71

(6) If there has been a denial of each of the prisoners' right to be heard in a material defense in the convicting court the unconstitutionality of such ruling cannot be validated or made harmless by a finding that the draft board proceedings supporting the order he desired to attack in defense are valid 71-73

(7) The illegal exclusion of the evidence by the convicting court upon an unconstitutional holding that the defense to which it related was not permissible prevents this Court from inquiring into the validity of the draft board proceedings 73-75

(8) Other courts have held that if there was a denial of a right to challenge the draft board order in criminal proceedings under the Act the court is not allowed to determine whether the draft board proceedings are valid but whether the tendered defense was frivolous. If the defense was not a sham it is held the prisoner was entitled to discharge 75-76

(9) The decision of this court in the *Estep* case does not require the court to confine review to an inquiry of the validity of the draft board proceedings and exclude as irrelevant an inquiry as to the proceedings in the convicting court 76-77

(10) The two-way attack against the judgments in the petitions for writs of habeas corpus requires, as an alternative, the Court to consider the draft board proceedings for the purpose of determining the authority to institute the prosecutions 77-79

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THREE *Continued*

(11) The failure of the court of appeals in the *Kulick* case to pass on the validity of the draft board proceedings in that case does not prevent this court from reviewing them if the question is reached in these cases 79-80

(12) Authority of the habeas corpus court to go behind the judgment of conviction, even though valid, and review the draft board proceedings is found in the habeas corpus cases where judgments of convictions rendered by an army court martial tribunal have been cut through to reach administrative proceedings alleged to support the jurisdiction of the armed forces 80-83

FOUR

The holdings of the trial court in the *Kulick* case and both of the courts below in the *Sunal* case that the orders of the draft boards were lawful are erroneous. The orders are illegal as a matter of law 83-137

A

The denials of the claims for exemption as ministers of religion made by the prisoners and their classifications by the draft boards were arbitrary, capricious and in excess of the jurisdiction of the draft boards, because they were without basis in fact 83-131

(1) The questions presented under this point and the subpoints are reached only in the event the court concludes there is no denial of rights upon the criminal trials of sufficient magnitude to entitle the prisoners to release on the writ of habeas corpus 83-84

(2) The undisputed evidence shows that each prisoner was a full-time missionary evangelist regularly engaged in preaching the gospel 84

(3) The youthfulness of the prisoners, especially Kulick, at the time they began training for the ministry, resulting in their beginning to preach at an early age, is not ground for denial of the exemption 84-86

PAGE

FOUR (A) *Continued*

(4) The status of a registrant as a minister at the time of his final classification is unaffected by his secular employment at a prior time—the regulations requiring that the liability of one for training and service be determined as of the time of final classification rather than as of the time of registration 86-87

(5) The performance of secular work as a vocation by Kulick was inconsequential and not extensive enough to require him to inform the board about it since his vocation of the ministry was unaffected 87-89

(6) There is nothing about the conduct of Kulick upon the hearing on his personal appearance before the board that justified the charge that he was evasive or raised a question as to his credibility on the claim for exemption as a minister of religion 89-90

(7) The denial of the claim of the prisoners for exemption because of their avocation and what they did with their spare time rather than what they did in connection with their vocation, the ministry, was arbitrary and capricious 90-91

(8) In the *Kulick* case all basis of objection to his claim for exemption, except his modeling, had been before the board and considered as unaffecting his claim for exemption when the board classified him as a minister 91-92

(9) The holding of the draft boards that the prisoners were not ministers is in conflict with the decisions of the courts and the administrative interpretations of the Selective Service System 92-94

(10) The absence of the prisoners' names from the certified official list of the full-time missionary evangelists known as pioneers circulated by national headquarters of the Selective Service System in no way justified the denial of the claim for exemption 94-98

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FOUR (A) *Continued*

(11) A broad and liberal interpretation should be placed upon the Act in keeping with the spirit of freedom of worship in this country and of the Act designed to preserve the institutions of the country during war 98-99

(12) Quotations from the Congressional Record showing some of the remarks of some of the Senators in respect to exemption of ministers of religion made while the Burke-Wadsworth Bill was being deliberated upon prior to its passage 99-102

(13) The National Director's Statement that there was a repugnance against making ministers of religion liable for training under the Act is further supported by the statement of the court of appeals in an interpretation of the Act 102

(14) The provisions of the Act and Regulations providing for the exemption of ministers of religion are quoted from 102-103

(15) It was the intention of the Congress to make the exemption broad enough to cover all the ministers of all denominations 103

(16) The term 'regular minister of religion' in other Acts similar to this one has been defined to include a minister who preaches regularly once each week and works at secular work during the week to support himself 103-111

(17) Even if it should be concluded that the prisoners are not entitled to exemption as regular ministers of religion they are nevertheless entitled to exemption as ordained ministers of religion 111-112

(18) A fair interpretation of the Act requires the Court to discard the orthodox definition of what constitutes a minister so as to avoid grievous discrimination and denial of equal protection of the law 112-115

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FOUR (A) *Continued*

(19) Intention of Congress to give a broad and liberal interpretation to the ministerial exemption provisions of the Act is shown in the exemption provided to the Lay Brothers of the Catholic orders who are not ministers in the sacerdotal sense 115-117

(20) A broad interpretation has been placed upon the Act and Regulations by the administrative agency in the execution of the Act except as to Jehovah's witnesses, to whom a narrow application of the Act and Regulations has been made 117-122

(21) While the narrow interpretation was applied almost uniformly by the local boards the Selective Service System in the operation of its Appeals Section at Washington relaxed the narrow construction so as to include presiding ministers of the congregations of missionary evangelists and the full-time missionary evangelists who were not presiding ministers 122-124

(22) Indisputably the prisoners in these cases come within the narrow and relaxed interpretation of the National Headquarters of the Selective Service System as to what constitutes a minister of religion insofar as Jehovah's witnesses are concerned 124-125

(23) The assertion of the Government that these men likely will be prosecuted again in the event they are discharged from custody is not probable in view of what was done in the *Estep* and *Gibson* cases 125

(24) Jehovah's witnesses make a distinction between the 'shepherd' and the 'flock' in that they are the ministers and their congregations are to be found in the homes of the people to whom they minister 125-126

(25) It is discriminatory to compare a congregation of laymen to a congress or group of missionary evangelists all of the latter of whom must be ministers before they may belong to the congregation 126-127

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FOUR (A) *Continued*

(26) Jehovah's witnesses are entitled to the same consideration in respect to their claim to exemption under the Act as ministers as are the ministers of other organizations 127-131

B

The local board in the *Kulick* case deprived him of a full and fair hearing before the board of appeal through failure to reduce to writing oral evidence offered by Kulick upon his personal appearance. This action was contrary to the Regulations and violated his rights to procedural due process contrary to the due process clause of the Fifth Amendment to the Constitution 131-137

(1) The undisputed evidence shows that the local board considered the oral evidence given upon his personal appearance but did not reduce it to writing as required by the regulations 131-132

(2) The provisions of the regulations require that the oral evidence be reduced to writing 132

(3) The requirements of these regulations are to insure a full and fair hearing as required by due process 132-133

(4) The duty on the part of the local board is mandatory because it is for the board of appeal and not for the local board to say whether the oral evidence is important enough to be considered by the board of appeal 133-134

(5) The decisions hold that violation of the requirements of a full and fair hearing make the administrative order in Kulick's case void 134-137

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Concluding Summary of Argument 137-143

(1) Orderliness of procedure in these cases presents two questions here, the second of which is an alternative question to be considered only if the first is answered adversely to the prisoners 137-138

(2) Irrespective of the reasons given by the courts of appeals in disposing of the prisoners in these cases the judgment of the court of appeals in the *Kulick* case should be affirmed and the judgment of the court of appeals in the *Sunal* case should be reversed 138-139

(3) The erroneous construction of the statute so as to abridge prisoners' rights to defend the indictments was such a serious denial of a constitutional right as to make the judgments of convictions void 139-140

(4) The upheaval of the erroneous interpretation of the Act by the inferior federal courts through the decisions in *Estep* and *Gibson* is not similar to the change in statutory construction that resulted in the remand of the prisoner in the *Warring* case 140-141

(5) If the convicting courts denied prisoners the right to make a substantial defense to the indictment such violation of prisoners' constitutional rights cannot be validated by a finding that the administrative orders are valid 141-142

(6) Each one of the prisoners is exempt from training and service as a minister of religion and the actions of the draft boards in denying their claims for exemption are without basis in fact 142

(7) The judgment in the *Kulick* case can be affirmed on the basis of the invalidity of draft board proceedings, if that issue is reached by this court, rather than vacating the judgment and returning the case to that court for further consideration, because this Court can render the judgment that such court should have rendered in these habeas corpus proceedings 142-143

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946

□

No. 840

MYRL E. ALEXANDER, WARDEN
Petitioner

v.

UNITED STATES OF AMERICA ex rel.
JOHN MYRON KULICK
Respondent

ON CERTIORARI TO
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT

□

No. 535

THEODORE MARTIN SUNAL
Petitioner

v.

DAVID R. LARGE, SUPERINTENDENT
Respondent

□

ON CERTIORARI TO
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FOURTH CIRCUIT

□

JOINT BRIEF FOR RESPONDENT KULICK AND PETITIONER SUNAL

Jurisdiction

The jurisdiction of this Court in both cases is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

The judgment of the circuit court of appeals in the *Kulick* case was entered October 29, 1946. [87]* Petition for writ of certiorari was filed within three months from that date. The judgment of the circuit court of appeals in the *Sunal* case was entered July 29, 1946. [118-119] Petition for writ of certiorari was filed within three months from that date.

Opinions of Courts Below

The opinion of the circuit court of appeals in the *Kulick* case appears in the record. [81-87] It is reported at 157 F. 2d 811. The opinion of the district court in the *Kulick* case also appears in the record. [52-72] It is reported at 66 F. Supp. 183.

The opinion of the circuit court of appeals in the *Sunal* case appears in the record. [102-118] It is reported at 157 F. 2d 165. The opinion of the district court in the *Sunal* case appears in the record. [92-93] This opinion is not reported.

Questions Presented

FUNDAMENTAL QUESTION

May the prisoners here (convicted under the Act of refusing to submit to induction when ordered to report therefor by their Selective Service boards) be released from custody on the writs of habeas corpus because the convicting courts illegally rejected their defenses that the orders were invalid, holding that they could not challenge the validity of the orders because such were immaterial as defenses to the indictments?

* All figures appearing in brackets herein denote pages of the printed record filed in each case.

SUBSIDIARY QUESTIONS

1. Was the denial of the prisoners' right to be heard on the proffered defenses such a violation of fundamental constitutional rights as to make the judgments subject to collateral attack and ground for discharge on writ of habeas corpus?

2. If not, did extraordinary circumstances exist requiring the courts below to hold that the writ of habeas corpus should be used as a substitute for an appeal to review the errors of the convicting courts in these cases?

3. If habeas corpus is available as a remedy to these prisoners, should the inquiry by court hearing the writs be extended to (a) whether the convicting court illegally denied the prisoners' tendered defenses or (b) whether the draft boards illegally ordered the prisoners to report for induction, or both?

4. If the hearing extends to an inquiry of whether the orders of the draft boards are illegal, does the undisputed evidence in both cases show (a) that the denials of prisoners' claims for exemption from training and service were without basis in fact and therefore in excess of the jurisdiction of the boards and (b) that the prisoners were denied rights of procedural due process contrary to the Fifth Amendment to the Constitution by the boards?

Statutes and Regulations Involved

Scope and effect of the Habeas Corpus Act (28 U. S. C. §§ 451-464) are involved. Sections 3 (a), 5 (d), 10 (a) and 11 of the Selective Training and Service Act of 1940, as amended (50 U. S. C. App. §§ 301-318) are also drawn in question here, as well as Sections 615.82, 622.44, 622.51, 623.1, 623.2, 625.1, 625.2, 626.1, 626.2, 626.3, 627.13, and 652.2 (b) of the Selective Service Regulations (32 C. F. R. Supp. 601.5 *et. seq.*) promulgated by the President under said Act.

Constitutional Provisions Involved

Clause 2 in Section 9 of Article I concerning the writ of habeas corpus is involved. Clause 3 in Section 9 of Article I, prohibiting bills of attainder, is involved. Clauses 1 to 3 in Section 2 of Article III, investing the judicial powers, and the Fifth and Sixth Amendments, are also involved.

Statement of Kulick Case

FORM AND HISTORY OF ACTION

This civil action was begun by filing a petition for writ of habeas corpus in the name of the United States of America upon the relation of John Myron Kulick. It was alleged that Kulick was illegally restrained of his liberty under a judgment and commitment charging him with an alleged violation of the Selective Training and Service Act of 1940, as amended, by refusal to submit to induction into the armed forces after reporting at the induction station pursuant to the order of the local board. [4, 6-22]

The district court issued the writ of habeas corpus. [4, 24] The warden filed his return, together with a supplementary return and motion to dismiss. [4, 26-33] Evidence was received. [4, 34-46] The case was argued, at the conclusion of which the court took the matter under advisement, reserving decision. [4, 45] On May 6, 1946, the court discharged the writ of habeas corpus and remanded Kulick to the custody of the warden. [3; 4, 72] Thereupon application made to have Kulick admitted to bail pending a disposition of his appeal was granted. [5, 73] The court entered findings of fact and conclusions of law, as well as the judgment. [4, 56-72] Notice of appeal and bond were duly filed.

In due course the appeal was briefed, argued and submitted to the circuit court of appeals. [81, 87] The judgment was reversed. [87] It has been brought here upon writ of certiorari. [88]

FACTS

Kulick was indicted in the United States District Court for the Southern District of New York. It was charged that he unlawfully and knowingly violated the Selective Training and Service Act of 1940 by failing and refusing to submit to induction as ordered by the armed forces after reporting for induction pursuant to the order of his local board. [7, 22] (TR 190)* The trial to a jury in that court began on May 2, 1945, concluding on May 3, 1945. [14-16, 38, 47] (TR 1, 190, 196) Upon the trial there was offered and received into evidence his entire draft board file showing the proceedings in reference to Kulick from the date of his registration to the date of his refusal to submit to induction, including evidence before the administrative agency on the status of Kulick under the Act. [40] (TR 29-34, 36-41)**

John Myron Kulick registered with Local Board No. 254, Jackson Heights, New York City, on June 30, 1942. (TR 22, 26) At the time he was 19 years of age. (TR 22). A questionnaire mailed to him on November 25, 1942, he returned properly filled out. (TR 22) He claimed therein to be a regular and duly ordained minister of religion. [8, 57] He showed that he devoted his full time to preaching as a missionary evangelistic minister for the Watchtower

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* Figures appearing in parentheses preceded by "TR" herein denote pages of the typewritten Transcript of the Record in the criminal trial of the *Kulick* case.

** Upon the hearing of the writ of habeas corpus in the trial court below the transcript of the evidence and proceedings of the Kulick's criminal trial was received in evidence as Exhibit 1. [39] Also the entire draft board file was received in evidence as Exhibit 2. [40] Hereafter certain portions of the draft board file will be referred to as exhibits identified by letters of the alphabet. Such identification is the designation given by the trial court in the criminal proceedings. When the exhibits were received in evidence (Exhibit 2) in the habeas corpus proceedings in the trial court below the documents still bore the identification [redacted] in the criminal proceedings.

Bible and Tract Society and Jehovah's witnesses. [8, 57] He showed that he was recognized by the Society, the legal governing body for Jehovah's witnesses, as an ordained minister of the gospel of God's kingdom. [8, 63-64] The Society had duly certified him to be such. [8, 63-64] He claimed exemption from all training and service under the Act by requesting the board to place him in Class IV-D, the classification provided for in the Regulations and under the Act. [8, 57] To his questionnaire he attached documentary evidence corroborating his claim for exemption as a minister, showing how that he regularly taught and preached as a minister of religion. [8, 57] In a statement (Defendant's Exhibit M, TR 33-34, 36) attached to his questionnaire, Kulick informed the board that he had taken an extensive course in the Watchtower divinity schools conducted by Jehovah's witnesses from 1935 to 1939 in preparation for the ministry. In his statement he pointed out that he had been ordained through prescribed ceremony of ordination in 1939; that although he had been engaged for several years part-time in the missionary work, he became a full-time pioneer minister in 1940, two years before he registered, which full-time missionary work required that he devote 150 hours thereto monthly; that he was fully consecrated as a minister in 1939, which was before this Country became involved in the war; that he was in sympathy with the democratic nations and their struggle against totalitarian aggression; that over six thousand of Jehovah's witnesses had been imprisoned in concentration camps in Germany since 1933, many of whom had been destroyed. (TR 33-34, 36, Exhibit M)

Upon the trial of the case, the judge of the convicting court allowed Kulick to testify limitedly as to his training, preparation and activity both as a student preparing for the ministry and as a minister. (TR 77-80) However, the greater part of his *de novo* testimony relating exclusively to his background and training was excluded by the court,

to which exception was taken and extensive offers of proof made. (TR 80-94) The court then permitted Kulick to testify that he entered the full-time pioneer missionary activity in June of 1940 during his summer vacation from school, returning to school and temporarily abandoning his full-time activity in the ministry in October 1940. He spent about four months all together in the full-time ministry in 1940. (TR 94-95) Kulick testified that in 1940 he went to school for another year; that he continued his part-time ministry during such period; that he obtained a secular job in August 1941 and continued therein until July 1942, at which time he quit secular work and re-entered the full-time pioneer evangelistic work. (TR 94-95) Kulick testified that ever since July 1942 he had been engaged in the full-time ministry and since that time he had not engaged in any full-time secular work or job. (TR 95-96)

To his questionnaire, filed in the latter part of 1942, he attached a certificate of ordination issued by the Watchtower Bible and Tract Society. This certicate showed that he had been baptized and had acted as a direct representative of the Society to perform missionary and evangelistic service in organizing and establishing churches and generally preaching the gospel in territory definitely assigned to him; that Kulick had wholly consecrated himself as a servant of Christ Jesus and Almighty God; had taken a course of study in the Bible and Bible helps prescribed by the Society and had shown himself apt to preach and teach the gospel, and was therefore declared by the Society a duly ordained minister of the gospel and authorized to represent said Society as a minister and preacher of the gospel. [8, 57, 63-64]

On February 4, 1943, Kulick wrote his local board calling its attention to Opinion No. 14 of National Headquarters of Selective Service System, as amended on November 2, 1942, concerning the ministerial status of Jehovah's witnesses. He mentioned that it was not necessary for his

name to be on the certified official list in order to be eligible for exemption as a minister of religion. He requested the board to place the letter in his file along with the questionnaire. This was to answer the question raised by correspondence between the local board and the New York City Selective Service Director. The position taken by Kulick as to the absence of his name from the certified official list was augmented by his statement dated April 8, 1943. These documents were received in evidence upon Kulick's criminal trial. (TR 32-34, 40)

The papers which Kulick filed with the local board prior to his classification and along with his questionnaire showed that he discontinued his full-time secular employment with RCA Communications on July 3, 1942. However, the papers showed that during the time he was performing secular work he nevertheless regularly continued to preach and teach as a missionary evangelist each week as a part-time minister. [56-57] The papers also showed that after the time of the filing of his questionnaire he had been engaged in full-time pioneer missionary evangelistic work, devoting a minimum of 150 hours monthly to the performance of his duties as a minister. [56-57] The local board classified him in I-A on March 29, 1943, making him liable for training and service in the armed forces. [57] He requested a personal appearance, which was denied by the local board in a statement that the board was reconsidering his classification upon the basis of the evidence submitted by him along with his questionnaire. [8-9, 57] Thereupon Kulick secured and mailed to the local board affidavits from Eutheme Chrysomalis, presiding minister of the Astoria, New York, congregation of Jehovah's witnesses; Fred N. Severud, presiding minister of the White Plains, New York, congregation of Jehovah's witnesses, and Leo Buczek, presiding minister of the Lower Manhattan, New York City, company of Jehovah's witnesses. These affidavits showed the extensive training and background of Kulick in the various min-

istry schools attended by him in preparation for his ministry; that he had been regularly teaching and preaching as a missionary evangelist in behalf of the Watchtower Society since 1939; that he was regarded by Jehovah's witnesses as standing in relation to them as do the clergy of the orthodox denominations and that at the time of the making of the affidavits Kulick was a full-time pioneer minister engaged in preaching as one of Jehovah's witnesses under direction of the Watchtower Society.* The local board thereafter exempted Kulick from all training and service by classifying him in IV-D as a minister of religion on April 28, 1943. [57] He received notice thereof May 5, 1943. (TR 106)

In August, 1943, Kulick obtained part-time employment as a professional model. [57] (TR 103) He said that he devoted only two hours weekly on an average to modeling, but said at times he had done more than two hours weekly modeling. However, he insisted that at no time did his modeling work interfere with or prevent his fulfilling his full-time missionary work. (TR 104) It is true that he testified that he told the agent of the FBI that he *could* earn at times $35.00 per week in this part-time work. The undisputed evidence showed, and the habeas corpus court found, that he averaged but two hours per week. [58] Furthermore the court found that, in spite of his modeling work, he was able to devote a minimum of 150 hours monthly to his missionary evangelistic service, as testified by Kulick. This was the number of hours prescribed by the Society for all full-time pioneer ministers, according to the findings of the trial court below. [57]

On August 23, 1944, the local board received a telephone message from a Mrs. Greenbaum, who was connected with another draft board (Local Board No. 255) informing Kulick's board that "a mother of three sons in service was at Board 255 raising quite a fuss because this boy is *not* in

* These affidavits were received in evidence upon the trial of the criminal proceedings. (TR 33, 40)

service." The informant said that the complainant was a neighbor to Kulick. The informant reported that the neighbor stated that Kulick spent "most of his time around the house when he isn't posing (at times in uniform) earning $40 an hour." [82] On the same day, as result of this hearsay information, the local board changed Kulick's classification from IV-D to I-A, making him liable for training and service. This was followed up by an order commanding him to appear on September 11, 1944, for a preinduction physical examination. [82] On August 26, 1944, Kulick in writing requested a hearing before the local board to discuss the action taken by the board and his claim for exemption. His request for personal appearance was granted for September 30, 1944. [82] (TR 44, 59)

Upon Kulick's personal appearance before the local board he discussed extensively his classification and offered oral evidence on additional material matters not covered in the written documentary evidence contained in his file. This was about his activity as a minister. It showed, among other things, in addition to his full-time missionary activity, that he preached regularly each week, in the orthodox manner, from the pulpit to a congregation of over 130 persons as an assistant presiding minister. (TR 107-109) The local board informed him that it did not need any grounds for changing his classification, in response to his statement to the board that there had been no change in his ministerial status. (TR 109-110) He informed the board that he devoted an average of two hours only per week to his modeling work from which he earned money, at the rate of $7.50 per hour,* sufficient to sustain himself in his preaching activity. (TR 110-111) The board asked him if he would go into the army as a chaplain and he replied that he would not.

* Even assuming that Kulick earned $35.00 weekly as a model, it would not be reasonable to conclude that he devoted more than five hours per week to this modeling work because the most he ever earned was $35.00 per week which, at $7.50 per hour, would be not more than five hours per week.

(TR 112) (The Court can judicially notice that the Army Regulations do not provide for induction of chaplains.) One member of the board stated that the board would not say that Kulick was not a minister. (TR 113) Kulick explained fully why his name did not appear on the certified official list and that it was unnecessary that it be thereon in order for him to be exempted as a minister. (TR 113-114) In answer to a question of the board, he explained about his having appeared in the army uniform for the purpose of being photographed in an army uniform. This was in his capacity only as a professional model. (TR 115-116) He was before the board upon his personal appearance for almost an hour. (TR 119)

The clerk testified that no written memorandum of any of the oral testimony was reduced to writing. (TR 45-46) A member of the board also testified that none of the oral evidence was reduced to writing. (TR 69) The board member said that the board considered all of the oral evidence offered by Kulick at his personal appearance. (TR 69-70) The board member testified that although the board concluded that most of Kulick's time was spent in professional modeling, he later clarified this by stating that he did not know how much time Kulick devoted to his professional modeling. (TR 70, 72) But he said he did recall that Kulick stated he devoted five hours per day and 150 hours per month in his preaching and teaching the gospel. (TR 69-70) Later on the board member said that, as he remembered, Kulick appeared to devote the better part of the day to his modeling work. (TR 70) Finally he said that Kulick stated he spent an average of five hours daily to his ministerial duties and the rest of his time to professional modeling. (TR 72)

It was unnecessary for Kulick to give any testimony on the habeas corpus hearing about what he told the board upon the hearing and about what the board members said. Both he and representatives of the local board testified

fully about this upon the criminal trial. The transcript of the testimony given on the criminal trial was offered in evidence by the Government. It was received as an exhibit without any limitations, being admitted for all purposes. Therefore the testimony appearing in the transcript proves what took place before the board as much as does the file made by the draft board. The judge of the district court in the habeas corpus proceedings considered the transcript of the criminal proceedings in making his findings as to what took place before the local board in respect to Kulick's classification. It is improper to limit consideration or exclude the transcript of the testimony from consideration in determining what the draft board did. All the evidence must be considered. It cannot be considered piecemeal as the Government would have the Court do in its suggestion to disregard the transcript.

The local board rejected his evidence and denied his claim for exemption because he had "been photographed in military uniform". [57, 68] While it is true that a member of the local board called by the Government testified that "the time he spent in making his livelihood did not jibe" with the time he gave to his ministerial duties [57] the undisputed evidence before the local board showed that there was no evidence disputing Kulick's evidence that he devoted an average of only two hours weekly to his modeling work. Moreover, the court found that Kulick devoted an average of 150 hours monthly to his ministerial work as a pioneer. [57]

On August 31, 1944, Kulick's I-A classification was continued. [58] On September 8, 1944, he appealed his classification. [58]

A written statement on appeal was filed by Kulick reviewing the undisputed written evidence in his file showing that he was entitled to exemption as a minister of religion. [58] He added that he had informed the local board at his personal appearance that "occasionally I do secular work but

that this work did not interfere with my pioneer duties and requirements." [58] He showed that he devoted, in accordance with Selective Service Regulations, "all or *substantially* all" of his time to the performance of his duties as a minister of religion. [58] Additionally, he stated that the average time spent "doing this secular work does not exceed 2 hours for the entire week." [58]

The board of appeal on consideration of this case, on October 3, 1944, classified him as liable for training and service by placing him in Class I-A. [61-62] The chairman of the board of appeal testified that none of the oral evidence or the oral discussion upon Kulick's personal appearance before the local board was considered by the board of appeal because it had not been reduced to writing and it was not in the file. (TR 74-76)

The Director of Selective Service System refused to review his classification, which made it impossible for Kulick to obtain further relief within the Selective Service System. [62]

Having been previously declared acceptable by the armed forces upon a preinduction physical examination, [62] Kulick was ordered to report for induction into the armed forces on November 9, 1944. [62] He reported at the induction station and was again accepted for training and service after completion of the screening process given by the armed forces. [62] He was directed to submit to induction. [62] He refused to submit to induction, resulting in his discharge from the induction station, subsequent arrest and prosecution under the Act for an alleged violation of the Act. [62]

The trial judge of the convicting court held that the illegality of the draft board order could not be challenged by Kulick as a defense against the indictment, declaring that the only question involved was whether or not Kulick submitted to induction as ordered. [35-36] (TR 29) For the same reason the convicting judge would not permit Kulick

to inquire of the member of the local board as to why he was taken out of Class IV-D and placed in Class I-A. (TR 63-66, 66-68) For the same reason the convicting judge denied Kulick the right to offer *de novo* evidence concerning his training and activity as a minister. (TR 80, 84, 85, 86, 87-90, 91, 97-98, 99-103, 132-134)

At the outset of the trial the judge of the convicting court was informed of the proper construction that should be placed upon the Act and Regulations. During the examination of the jurors on *voir dire* counsel for Kulick declared to the judge, among other things, to-wit: "On the contrary, you take the Falbo decision and you take the Billings decision, I think it clearly shows that when a man has completed the administrative process he must be in a position to defend to the indictment and that the court can review the legality of the administrative order in defense to the indictment." (TR 6) The judge responded: "I think it all comes down to the same proposition that Jehovah's Witnesses claim the right to set the law aside. I think it comes down to that. . . . I don't think that the courts are here to review the determinations of the Selective Service Board." (TR 6)

During the time that parts of the draft board file were offered in evidence the prosecuting attorney said: "If your Honor please, I object to this method. This is an attempt to review the action of the local board. THE COURT: It is not going to be successful, I will tell you that for your information." (TR 29) Counsel for Kulick excepted, drawing this retort from the judge: "You may take an exception. It is noted. But this Court and this jury are not going to review the action of the local board, and I think you understand that better than most lawyers. That calls for no further observation from you." (TR 29)

On excluding evidence counsel for Kulick stated to the judge of the convicting court: "I desire to make my offer of proof. THE COURT: Go ahead and make your offer of

proof. I am merely pointing out that you are offering to prove a lot of things that you as a lawyer know are wholly irrelevant here." (TR 84)

While Kulick was attempting to elaborate upon what happened before the local board upon the personal appearance and also for the answering the testimony of the chairman of the local board the judge of the convicting court stopped him and reminded counsel for Kulick in these words, to wit: "I am telling this witness that I do not want him to repeat verbatim what he said to the board, and if it is necessary I will repeat that to you. We have got to bring this trial to a close at some time, and we are not going to have him repeat verbatim word for word what he said to the board. If you do not like that take an exception." (TR 118)

At the close of all the evidence in the criminal trial, Kulick moved for dismissal of the indictment and for a directed verdict upon legal and constitutional grounds which are apparent in the record. The motion was denied to which Kulick excepted. (TR 136, 144)

Kulick's numerous requested instructions to the jury were denied because the judge of the convicting court was of the opinion that the validity of the draft board order was not a matter for the consideration of the court or the jury. (TR 145-189, 194-195) The judge of the convicting court instructed the jury that "it must strike you as rather an idle thing for you to be asked to deliberate and to pass judgment upon an issue which really isn't contested. I think it is an incongruous thing myself, but that is the law of the land. If a man does not plead guilty to a charge he has the right to be tried by a jury. . . . [¶] I told you when you were being examined that it might be necessary to tell you that this jury does not sit in review on the action of the local board. You are not here to substitute your judgment for the action of the local board. And I asked you if you would be prepared to accept this in-

struction. I repeat it at this time. It doesn't make the slightest particle of difference whether you think this man was properly classified or not, whether you think he was an ordained minister or not. That has nothing to do with the performance of your duties. All that you have to determine is whether he reported for induction, whether he submitted himself to induction in the United States armed forces. I state that with great confidence because it has been decided in a great many of the courts of the United States during the past few years under the Selective Service Law, and in the cases of other persons claiming to be affiliated with the sect to which reference has been made in this case; and the courts have universally held, and they have been sustained by the higher courts, that there is no question before the jury as to whether the local board acted in accordance with the jury's judgment or not. . . . I merely explain these things so that you will understand the system of law under which the selective service of American citizens found to be physically qualified to serve the Government has been administered, and why it would be impossible for any such system to function if juries and the courts were to determine whether a given individual should be in the Army or the Navy. [¶] That is the reason why I said to you at the outset, and I now repeat to you, it is no part of your job to consider whether you think the classification adopted in this case was wise or unwise. Your only job is to determine whether under the evidence in this case it has been shown to you beyond a reasonable doubt that this defendant failed to submit to induction into the armed forces of the United States." (TR 190, 191-192, 193)

Kulick duly excepted extensively to each and every part of the above charge and holding of the convicting court on the grounds that the court had stricken all of the evidence received in behalf of Kulick showing that he was a minister of religion and exempt from training and service and thereby precluded the jury from considering said evidence, in-

structed the jury to find Kulick guilty, which denied him the right of trial by jury [47-51] and that the court thereby violated Kulick's constitutional rights, denied him a judicial trial and converted the law into an unconstitutional law, contrary to the bill of attainder clause of the Constitution, and abridged his rights to due process of law, in violation of the Fifth Amendment to the Constitution. [47-51]

Kulick was convicted by the jury. [52] (TR 196) Thereafter he was sentenced to serve a term of three and one-half years in the custody of the Attorney General. [52] (TR 197-198) Kulick did not appeal from the judgment of conviction. [52] Kulick was committed to the custody of the warden of the Federal Correctional Institution at Danbury, Connecticut, where he remained until released upon bail pending a disposition of his appeal in these proceedings. [73-74]

HOW ISSUES RAISED

The issues were raised by the petition for writ of habeas corpus, the returns of the warden, the evidence received upon the hearing and the order of the district court discharging the writ and remanding Kulick to custody of respondent. [6-22, 26-29, 30-33] In the petition for writ of habeas corpus, Kulick contended that upon the trial of the indictment before the jury in the District Court in the Southern District of New York, he was denied his constitutional right of a fair trial and the right to be heard in his defense, contrary to the Constitution. [14-16] He contended that the convicting court deprived him of a judicial trial and denied him due process of law by holding that he was not entitled to challenge the validity of the order commanding him to submit to induction, in rejecting his evidence, in refusing charges to jury, and in refusing the jury, by charge of the court, the right to consider evidence showing the invalidity of the order. [14-16] By reason of this action of

the convicting court, he claimed that the Act was given an unconstitutional construction causing him to be penalized contrary to the due process clause and bill of attainder clause thus denying his defenses to the indictment. [14-16] He contended that the court transferred the judicial power of the court to the draft board, denied him his right of trial by jury, refused him the right to a judicial trial and abridged his liberty, contrary to the due process clause of the Fifth Amendment to the Constitution. [16] Moreover, he alleged that the Act and Regulations, by construction of the court, had been transformed into a bill of attainder, contrary to Clause 3 in Section 9 of Article I of the Constitution. [16]

The courts below found that extraordinary circumstances existed warranting the use of habeas corpus to review the criminal proceedings. [53, 82-84] The trial court below, however, erroneously held that the action of the convicting court was not ground for discharge upon a petition for writ of habeas corpus, because the draft board file failed to show that Kulick was arbitrarily and capriciously classified and illegally deprived of his rights under the Act and Regulations by the Selective Service System. [53] Moreover, the district court below held that the action of the convicting court, depriving Kulick of his defenses, was harmless error and not ground for discharge of Kulick because the draft board record contained evidence on which the draft boards were justified in placing him in Class I-A and denying his claim for exemption as a minister of religion. [56-72] The basis for this conclusion was that, because he had devoted part of his time to the performance of secular work, Kulick could not complain of the action of the draft board in rejecting his claim for exemption as a minister. [56-72] The district court concluded that the action of the draft boards in denying Kulick his ministerial classification and in classifying him as liable for training and service was not a denial of due process of law and was not arbitrary and capricious.

[70-72] The district court below held that the action of the convicting court in rejecting the evidence and in charging the jury was not a denial of due process of law. [72] The court of appeals below overruled the district court on these points and declared that the imprisonment of Kulick was unlawful and that he was entitled to a discharge from custody. [81-88] The court of appeals below held that the denial of the right to make his defense to the indictment was ground for discharge. [81-88]

Statement of Sunal Case

FORM AND HISTORY OF ACTION.

This civil action was begun by filing a petition for writ of habeas corpus in the name of the United States of America upon the relation of Rudolph J. Sunal, brother of Theodore Martin Sunal. It was alleged that Theodore Martin Sunal was illegally restrained of his liberty under a judgment and commitment of the United States District Court for the Western District of Pennsylvania based upon an indictment charging Sunal with an alleged violation of the Selective Training and Service Act of 1940, as amended, by refusal to submit to induction into the armed forces after reporting at the induction station pursuant to the order of the Selective Service System. [1-20]

The district court issued the writ of habeas corpus. [20] The warden filed his return, together with a demurrer and motion to dismiss. [24-27] Evidence was received. [89-94] The case was argued, at the conclusion of which the court discharged the writ of habeas corpus and remanded Sunal to the custody of the warden. [98-99] Thereupon application was made to have Sunal admitted to bail pending a disposition of his appeal. [98] Bail was allowed because of substantial questions that should be decided upon appeal. [99] The district court entered findings and conclusions as well as the judgment. [96-98] Notice of appeal and bond were duly filed.

In due course the appeal was briefed, argued and submitted to the circuit court of appeals. [101, 102] The judgment was affirmed. [118-119] It has been brought here upon writ of certiorari. [119]

FACTS

Sunal duly registered under the Act with Local Board No. 26, Pittsburgh, Pennsylvania. On January 15, 1941, he filed his questionnaire [28-33] in which he stated in Series VIII that he was not a minister of religion. [30] However, he claimed classification in Class IV. [31]

As a result of his statement that he had conscientious objections to both combatant and noncombatant service [31] he was forwarded a Special Form for Conscientious Objector. [34-37] He filled it out stating that "From childhood, through parental guidance have I been taught the necessary steps for true Christianity. The Bible used as the source of all training. . . . As one of Jehovah's witnesses I have partaken in door to door testimony service, presenting the gospel message to those who cared to hear according to Matt. 24: 14 and Isaiah 61: 1, 2." [34, 35] He stated that he was associated with the Watchtower Bible and Tract Society, the governing body of Jehovah's witnesses, having been raised from childhood in such faith. [36]

On May 10, 1941, the local board placed him in Class 1-A. [31] On May 15, 1941, he submitted to the local board an affidavit from Joseph J. Petti, presiding minister, showing that Sunal was "a regular and an ordained minister of God serving as such for Jehovah's Witnesses under the jurisdiction of the Allegheny Unit of Pittsburgh Company of Jehovah's Witnesses and that he has been so actively engaged regularly since the year 1935." [37] Along with such affidavit Sunal submitted extensive documentary evidence to support his claim for exemption as a minister of religion. [32, 37]

Such documentary evidence consisted of two pamphlets

published by the Watchtower Society, as well as an ordination card issued by the Society showing that Sunal had been ordained to preach the gospel of God's kingdom, which is of paramount importance. In his statement dated May 15, 1941, filed with the board, he stated that he was associate minister of the Allegheny Unit of Jehovah's witnesses. (Exhibit C)

A quorum not being present on May 15, 1941, the board postponed a determination of his case until June 24, 1941, when a quorum was present. [32] The local board denied Sunal's claim for exemption because it did not "believe the registrant's status comes within the purpose and intent of the Selective Service Act regarding ministers." [32] He appealed from the 1-A classification on July 1, 1941. [31] On July 8, 1941, the board permitted him to appear before it again.

A memorandum made by the local board concerning the hearing reads that Sunal "stated he has no regular church or institution where he preaches, but goes from house to house in the evening to teach their doctrines. He receives absolutely no salary or remuneration for this, and depends entirely on his secular job to support himself." [39]

In a letter dated July 8, 1941, to the appeal agent, Sunal submitted additional facts pertaining to his ministerial status which the appeal agent forwarded to the board of appeal. (Exhibit C). In his letter of July 10, 1941, to the local board, for the benefit of the board of appeal, Sunal reviewed his training for the ministry and explained why it was that he engaged in secular work to support him in his ministerial activity. [39-40]

On July 29, 1941, the board of appeal referred the case to the Department of Justice for investigation on his conscientious objection to military training and service. He was notified of a hearing of his claims before the Hearing Officer of the Department of Justice to be held on December 30, 1941. Lydia Dorst and Tom McKnight wrote letters

dated December 27, 1941, for filing with the Hearing Officer, certifying that Sunal was a duly ordained minister of religion. (Exhibit C) According to the records of the Hearing Officer, eighteen persons testified before him that Sunal was a minister of religion. (Exhibit C)

The Hearing Officer is said to have stated upon the hearing that there "is no evidence that can be construed as evidence which is unfavorable to or tends to defeat" Sunal's claim. [42] In his letter dated December 28, 1941, to the Board of Appeal Sunal explained why he stated he was not a minister of religion in his questionnaire and he amended Series VIII of his questionnaire as follows: "In that statement under Series VIII of the questionnaire, I refused to concede or acknowledge, denied myself the title of Minister of Religion. This I did on grounds alone that as defined and understood by myself and the scriptures do teach that 'Religion is doing anything that is contrary to the will of God Almighty.' I also wish to grant for benefit of clarification that, 'Christianity is the following in the footsteps of Christ Jesus and doing the will of his Father Jehovah.' If the term Christianity had been used instead of Religion in that Series VIII of the questionnaire I would have answered thus.

1. (a) I *am* a minister of Christianity
   (b) I *do* customarily serve as a minister of Christianity
   (c) I *have been* a minister of the Allegheny Company of Jehovah's Witnesses.
   (d) I have been formally ordained." [43]*

On January 27, 1942, the board of appeal classified Sunal in IV-E. [31] On January 31, 1942, Sunal wrote the State Director of Selective Service to review his case, appeal it to the President and cause him to be granted his claim for exemption as a minister of religion. (Exhibit C) On Feb-

* His failure initially to fill out Series VIII of the Questionnaire or claim classification as a minister of religion therein, does not seem to have been considered by the Selective Service System.

ruary 26, 1942, in a letter addressed to Sunal the State Director refused to take action. (Exhibit C) On March 2, 1942, by letter, the National Director was requested by Sunal to review his case. This request was refused by letter dated April 20, 1942, from the Deputy Director. (Exhibit C) On March 9, 1942, Sunal was ordered to report to a civilian public service camp on March 19, 1942, to do work of national importance. (Exhibit C) On May 19, 1942, Sunal was convicted under Section 11 of the Act in the district court at Pittsburgh for failure to report. He was sentenced to prison to two years and fined $10000. [46, 114]

On December 6, 1943, Sunal was released from prison and on December 29, 1943, notified his local board of his return to his home. [46] On January 6, 1944, the State Director notified the local board that inasmuch as Sunal claimed classification as a minister, "it will be appropriate for you to consider his claim to a IV-D classification. If you believe that his activities are such that a IV-D classification is warranted, you should reopen his classification and advise him." [47]

On May 19, 1944, following the expiration of his sentence, he having been released on Conditional Release prior to the completion of his term in prison, the local board placed him in Class 1-A. [32, 46] He requested a personal appearance by letter dated May 26, 1944. (Exhibit C) A personal appearance was granted to him for June 9, 1944, at which time he appeared before the local board. [32, 49-50]

Letters and sworn statements signed by thirteen persons (some of whom were and some of whom were not Jehovah's witnesses) were presented to the local board at the time of the hearing. They showed that Sunal was a full-time pioneer minister, assistant to the presiding minister of the Allegheny congregation of the Pittsburgh company of Jehovah's witnesses, and that by reason thereof he stood in relation to Jehovah's witnesses as do the orthodox religious

clergy toward their congregation. [55-62]* Sixty-eight persons signed a petition certifying that Sunal was a regular minister of religion, preaching and teaching the principles of Christianity under the direction of Watchtower Bible and Tract Society as a full-time pioneer missionary evangelist. [63-65]

The undisputed evidence, upon his June 9, 1944, personal appearance, showed Sunal applied to the Watchtower Society for appointment as a full-time pioneer on or before January 1, 1944. By letter dated January 1, 1944, the Society wrote Sunal that he had been appointed as a full-time pioneer minister, requiring to perform 150 hours monthly, in preaching and teaching as a missionary evangelist. (Exhibit C)

On May 26, 1944, Sunal had informed the board that he devoted approximately four hours daily from 8 a.m. to 12 noon working as a mechanic at the George Maier Garage in Pittsburgh beginning January 1944. [48]

The board made a memorandum concerning this as follows: "He does not consider this a job, but a means of earning his daily bread. The remainder of the day is devoted to the ministry; gives approximately 150 hours per month." [48]

Upon Sunal's personal appearance on June 9, 1944, the board found that there had been "no change in status of registrant" and that his status was the same as "when classified by the appeal Board on 7/29/41. Registrant so classified to Class 1-A 3-O." [32] He was mailed such classification advice on June 24, 1944. [32] Sunal appealed from such classification in writing on July 1, 1944. [67]

On July 3, 1944, he filed a written statement upon appeal. In it he reviewed the reasons why he should be classified as a minister of religion and pointed out facts showing a change in his status. He emphasized points that had been

* See also unprinted letters appearing in Sunal's draft board file. (Exhibit C)

overlooked, or given no weight, by the local board concerning his claim for exemption. Among other things he stated: "I immediately chose to re-enter the field of ministry in a more responsible position and thus became directly appointed by the Watch Tower Bible and Tract Society as a full-time publisher. This appointment and authorization as such are in my file photostated. . . . The few early morning hours of five and six days a week I earn honestly my daily bread in the toils of labor and sweat." [68, 69]

The local board made a memorandum for the use of the board of appeal in which it illegally stated its argument and grounds for denying his claim for exemption as a minister of religion. [76] The board of appeal relied upon this statement [76] and also found that "Registrant has been a minister since 1935. He claims he devotes 150 hours a week [sic] to the ministry which does not include his appearance once a week before the congregated group of Allegheny Unit of Jehovah's Witnesses; it also does not include time spent in preparing to meet the audience." [77]

On September 21, 1944, Sunal, by letter, requested the State Director to review the classification given him. On September 26, 1944, the State Director declined any further action in behalf of Sunal. [78] Again the State Director informed him of the intention not to review his case, in answer to letter of Sunal to the National Director at Washington on September 21, 1944. The letter had been referred to the State Director for answer. [79]

Sunal was given several preinduction physical examinations and found acceptable for training and service. He was ordered, on October 7, 1944, to report for induction on October 25, 1944. [33] He appeared and refused to submit to induction. [33, 80-83] He was indicted for failure to submit to induction as commanded on October 25, 1944. [18-19]

Sunal "was tried to the Court before a jury in the United States District Court for the Western District of Pennsylvania on March 22, 1945. That upon such trial, [Sunal] at-

tempted to offer *de novo* evidence as to his activity, background and training as a minister and also upon the trial attempted to offer into evidence the entire Draft Board file, which is marked as Exhibit C . . . [¶] Such evidence thus offered in behalf of [Sunal] as a defense to the indictment for the purpose of showing that the Draft Board exceeded its authority and acted illegally, was rejected by the Court, excluded on the ground that the trial Court was of the opinion that the jury could not inquire into the validity of the Draft Board proceedings and could not determine whether or not [Sunal] was or was not a minister of religion within the meaning of the Act and Regulations. [¶] Upon the trial, the Court charged the jury that in determining the guilt or innocence of [Sunal] under the indictment, that they could not consider whether or not the Draft Board acted illegally in classifying [him] or whether it exceeded its authority and that the question for the jury to determine was whether or not he unlawfully, willfully and knowingly failed and refused to submit to induction as alleged in the indictment. [¶] [Sunal] objected and excepted to the rulings of the Court in excluding the evidence and to the charge of the Court." [87-88]

Sunal was convicted on March 22, 1945, the second time, for an alleged violation of the Selective Training and Service Act by the United States District Court for the Western District of Pennsylvania. [17-18, 86-87] He was sentenced to the custody of the Attorney General for a period of five years. [17-18, 33]

No appeal was taken from such judgment. Sunal was committed to the custody of the warden of the Federal Prison Camp at Mill Point, West Virginia, where he remained until released upon bail pending a disposition of his appeal in these proceedings. [98]

HOW ISSUES RAISED

The issues were raised by the petition for writ of habeas corpus, the return of the warden and the order of the district court below. [1-17, 23-27, 98-99, 103] In the petition for writ of habeas corpus, Sunal contended that upon the trial of the indictment before the jury in the District Court for the Western District of Pennsylvania, he was denied his constitutional right of a fair trial and the right to be heard in his defense, contrary to the Constitution. [2-3] He contended that the convicting court denied him due process of law by holding that he was not entitled to challenge the validity of the order commanding him to submit to induction, and in refusing him the right to offer evidence showing the invalidity of the order. [11] By reason of this action of the convicting court, Sunal claimed that the Act was given an unconstitutional construction causing him to be penalized contrary to the due process clause and denied his defense to the indictment. [11-12] He contended that the court transferred the judicial power of the court to the draft board, denied his right of trial by jury, refused him the right to a judicial trial and abridged his liberty, contrary to the due process clause of the Fifth Amendment to the Constitution. [12] Moreover, he alleged that the Act and Regulations had been transformed, by construction of the court, into a bill of attainder, contrary to Clause 3, Section 9 of Article I of the Constitution. [12]

The courts below held that the action of the convicting court was ground for discharge upon a petition for writ of habeas corpus, only if the draft board file showed that Sunal had been arbitrarily and capriciously classified and illegally deprived of his rights under the Act and Regulations by the Selective Service System. [88-89, 107] However, the courts below found that extraordinary circumstances existed warranting the use of habeas corpus to review the criminal proceedings. [103-108] The courts below erroneously held that the action of the convicting court was

harmless error and not ground for discharge of Sunal because the draft board record contained evidence on which the draft boards were justified in placing him in Class I-A and denying his claim for exemption as a minister of religion. [89, 92, 96, 109, 112-115] The basis for this conclusion was that because Sunal devoted part of his time to the performance of secular work, he could not complain of the action of the draft board in rejecting his claim for exemption as a minister. [90, 92-93, 115-117] The courts concluded that the action of the draft boards in denying Sunal the ministerial classification and in classifying him as liable for training and service was not a denial of due process of law and was not arbitrary or capricious. [93, 96-97, 113, 115-116] The courts below held that the action of the convicting court in rejecting the evidence and in charging the jury was not a denial of due process of law. [96-97, 109, 112] The courts below declared that the imprisonment of Sunal was lawful and that he was not entitled to a discharge from custody. [97, 118]

SPECIFICATION OF ERRORS

The circuit court of appeals erred.

1. In failing to hold that the action of the convicting court complained of by Sunal was such a denial of fundamental constitutional rights as to make the conviction subject to collateral attack on habeas corpus.

2. In failing to hold that the extraordinary circumstances warranted the use of habeas corpus as a substitute for appeal to review mere errors of law.

3. In failing to hold that the draft board determination was in excess of its jurisdiction because made without basis in fact.

4. In affirming the judgment of the district court.

POINTS FOR JOINT ARGUMENT

[See NOTE below]

ONE

Refusal by the sentencing courts to permit prisoners to make their defenses to the indictments and the holding that it was necessary for prisoners to submit to induction and thereafter apply for writs of habeas corpus as the only remedy were denials of judicial trials and fundamental constitutional rights contrary to the due process clause of the Fifth Amendment to, and the bill of attainder clause of, the Constitution so as to make the convictions subject to collateral attack on habeas corpus.

A

The history and express provisions of the Constitution securing the writ of habeas corpus and the statutes implementing the guarantee have been given a liberal interpretation so as to permit a broad scope of inquiry in determining the legality of custody.

B

The denial of prisoners' defenses as a result of the unconstitutional construction placed upon the Act was a denial of fundamental rights contrary to the due process clause of the Fifth Amendment to, and the bill of attainder clause of, the Constitution, making the judgment subject to collateral attack on habeas corpus.

NOTE: An epitome of the various reasons supporting the points for argument or a summary of the prisoners' argument appears at the end of this brief under the heading "Concluding Summary". It appears at pages 137-143, infra. A disintegrated summary of the argument, showing references to pages of this brief where the respective parts of the argument appear, is part of the index at the beginning of this brief. It immediately precedes the table of cases cited.

TWO

Extraordinary and unusual circumstances in the law existed at the time of the convictions of these prisoners in these cases, justifying their failure to appeal and warranting their use of the writs of habeas corpus as a substitute for appeal, to review the unconstitutional denial of the defenses in the criminal trials of the prisoners.

THREE

The scope of inquiry on the disposition of the writs of habeas corpus in these cases properly ought to extend to a determination of the validity of the draft board proceedings only in event this court concludes that the illegality of the proceedings in the convicting courts is not sufficient to justify a discharge of the prisoners.

FOUR

The holdings of the trial court in the Kulick case and both of the courts below in the Sunal case that the orders of the draft boards were lawful are erroneous. The orders are illegal as a matter of law.

A

The denials of the claims for exemption as ministers of religion made by the prisoners and their classifications by the draft boards were arbitrary, capricious and in excess of the jurisdiction of the draft boards, because they were without basis in fact.

B

The local board in the Kulick case deprived him of a full and fair hearing before the board of appeal through failure to reduce to writing oral evidence offered by Kulick upon his personal appearance. This action was contrary to the Regulations and violated his rights to procedural due process contrary to the due process clause of the Fifth Amendment to the Constitution.

ONE

Refusal by the sentencing courts to permit prisoners to make their defenses to the indictments and the holding that it was necessary for prisoners to submit to induction and thereafter apply for writs of habeas corpus as the only remedy were denials of judicial trials and fundamental constitutional rights contrary to the due process clause of the Fifth Amendment to, and the bill of attainder clause of, the Constitution so as to make the convictions subject to collateral attack on habeas corpus.

A

The history and express provisions of the Constitution securing the writ of habeas corpus and the statutes implementing the guarantee have been given a liberal interpretation so as to permit a broad scope of inquiry in determining the legality of custody.

The intolerable abuses of the criminal process of the law of the land in England led to the invention by the chancery of a writ commanding the production of the body of the person detained. The writ, first called the *writ de homino replegiando,* later became known as the writ of habeas corpus. The writ of habeas corpus was issued before the Magna Charta under the name of *de odio et atia* and is specifically mentioned in Article 36 of the Magna Charta which provides that it shall "not be refused". During these periods it played an important part in enabling a person to avoid trials by ordeal and by battle in violation of the right to a judicial trial.

During the reign of Charles I, the king and his judges completely lost their reason and balance. The warden of the Fleet Prison had made returns to writs of habeas corpus, stating that the prisoners, in whose behalf they had been obtained, were confined by warrant of the privy council

or committed by special command of the king. Though counsel for the prisoners insisted that the council was bound to assign a sufficient cause of commitment, the judges decided that the royal mandate was warrant enough for any arrest and detention.

The House of Commons thereupon passed resolutions condemning the decision in *Darnel's Case* (1627) and, after a conference with the House of Lords, the measure known as the Petition of Right was passed in 1627. (3 Car. I, c. i) In section 5 of this Act are recited the above facts, and it was enacted "that no freeman in any such manner as is before mentioned be imprisoned or detained". Later, in 1641, by Act abolishing the Star Chamber, the right to the writ of habeas corpus was given to test the legality of commitments by command or warrant of the king or the privy council.

The reign of Charles II was marked by progress of the use of the writ of habeas corpus. Lord Clarendon was impeached for causing many persons to be imprisoned against the law and to be conveyed in custody to places outside of England. During 1679, in consequence of Clarendon's arbitrary proceedings, a new bill was introduced which passed both Houses and became the famous Habeas Corpus Act of 1679 (31 Car. II, c. 2)*

"The great writ of habeas corpus has been for centuries esteemed the best and only sufficient defense of personal freedom. In England after a long struggle it was firmly guaranteed by the famous Habeas Corpus Act of May 27, 1679, 'for the better securing of the liberty of the subject,' which, as Blackstone says, 'is frequently considered as another *Magna Charta*.' It was brought to America by the colonists, and claimed as among the immemorial rights de-

* Holdsworth, *History of the English Law*, vol. 9, pp. 108-125; Cooley, *Constitutional Limitations*, 8th ed., vol. 1, pp. 709-728; *Watson on the Constitution*, vol. 1, pp. 721-733; *Kent's Commentaries*, 12th ed. (Holmes), vol. 2, pp. 32-42.

scended to them from their ancestors. Naturally, therefore, when the confederated colonies became united states, and the formation of a common government engaged their deliberations in convention, this great writ found prominent sanction in the Constitution. That sanction is in these words: 'The privilege of the writ of habeas corpus shall not be suspended unless when, in cases of rebellion or invasion the public safety may require it.' . . .

"This brief statement shows how the general spirit and genius of our institutions has tended to the widening and enlarging of the habeas corpus jurisdiction of the courts and judges of the United States; and this tendency, except in one recent instance, has been constant and uniform; and it is in light of it that we must determine the true meaning of the Constitution and the law . . .

"These considerations forbid any construction given to doubtful words the effect of withholding or abridging this jurisdiction. They would strongly persuade against the denial of jurisdiction even were the reason for affirming it less cogent than they are." (Ex parte *Yerger*, 8 Wall. 85, 95-96, 102-103)*

In 1789 the writ of habeas corpus was first spoken of by the legislature when Congress passed the Act of September 24 (1 S. L. 81) to implement the provisions of the Constitution. The power was extended again by the Act of March 2, 1833, and again by the Act of August 29, 1842.

The Act of February 5, 1867, expanded the right to the writ to its present use. Section 14 of the Act of 1789, provides, among other things, that the writ shall extend to cases where prisoners are in custody by authority of the federal government and "are committed for trial before some court of the same". The provisions of the original act

* Compare *Bridges v. California*, 314 U. S. 252, 264-265. Mr. Justice Stone exhaustively reviews the history, law and constitutional provisions on the subject in *McNally v. Hill*, 293 U. S. 131, 135-139, to which reference is here made.

and the various amendments are now incorporated in Title 28 of the United States Code, sections 451 to 466.

In Walker v. Johnston, 312 U. S. 275, 285, the Court declared: "As we have said in Johnston v. Zerbst, 304 U. S. 458, Congress has expanded the rights of a petitioner on habeas corpus." Sustaining the claim for the writ, in *Smith v. O'Grady*, 312 U. S. 329, Mr. Justice Black referred to the writ as the great "historic remedy", thus echoing the views of the Court expressed in cases referred to above.

B

The denial of prisoners' defenses as a result of the unconstitutional construction placed upon the Act was a denial of fundamental rights contrary to the due process clause of the Fifth Amendment to, and the bill of attainder clause of, the Constitution, making the judgments subject to collateral attack on habeas corpus.

Ordinarily a judgment and commitment under which a prisoner is detained is impervious to collateral attack on habeas corpus or can be attacked only by direct appeal. But, if during the trial under an indictment, the prisoner's constitutional rights were denied him, the judgment of the sentencing court may be collaterally attacked and full inquiry of the denial of the rights had upon petition for writ of habeas corpus.

Upon the trial of the prisoners in the convicting courts they attempted to attack the draft board orders, made the basis of the indictments, on the ground that the orders were invalid. Both convicting courts held, as a matter of law, that the action of the draft boards could not be questioned under any circumstances in the prisoners' defense against the indictments. The courts held that the administrative proceedings leading up to the issuance of the orders were conclusively presumed to be valid and absolutely free from attack in trial of the indictments. The convicting courts held, as a matter of law, that unless and until the prisoners had

submitted to induction as required by the draft board orders, the administrative proceedings could not be questioned. The courts held that the orders could be questioned only after induction by way of writ of habeas corpus. The basis of the holdings of the convicting courts, resulting in the denial of the prisoners' tendered defenses, was due to erroneous misinterpretation of the Act by the courts of appeals and of the holding of this Court in the case of *Falbo* v. *United States*, 320 U. S. 549. This was merely a part of the false and unlawful construction placed upon the Act and Regulations by all of the inferior federal courts in the country. The denials of similar tendered defenses in other cases arising under the Act were later held by this Court to be erroneous and requiring reversal of judgments of conviction under the Act in circumstances identical to the denials of the tendered defenses by the convicting courts in these cases. *Smith* v. *United States*, 327 U. S. 114, *Estep* v. *United States*, 327 U. S. 114, *Gibson* v. *United States*, 67 S. Ct. 301, *Dodez* v. *United States*, 67 S. Ct. 301.

The prisoners in these cases contend that the erroneous construction of the Act by the convicting courts (resulting in such courts holding that the tendered defenses were irrelevant and immaterial and not permissible as a matter of law) constitutes an extraordinary and unusual denial of fundamental rights guaranteed by the Constitution. This is sufficient to permit the writs of habeas corpus to be employed to afford them relief from their unlawful detention.

In these two cases, in other words, the Court is requested to go a step further than the steps taken by it in *Smith*, *Estep*, *Gibson* and *Dodez* cases. The Court is now called upon to determine whether or not the erroneous construction and interpretation placed upon the Act by the convicting courts was unconstitutional. This Court must now decide whether the rejection of the tendered defenses in these cases, identical to the rulings of the trial courts in the *Smith*, *Estep*, *Gibson* and *Dodez* cases, entitles them to dis-

charge on habeas corpus as to the same rulings entitled Smith, Estep, Gibson and Dodez to new trials.

It has been uniformly held that to deny a defendant in a criminal or civil case the right to be heard and to make his defenses is a rank denial of procedural due process.*

Moreover, to deny one the right to be heard in his defense to a criminal charge is to deny a judicial trial contrary to the bill-of-attainder clause of the United States Constitution, in addition to amounting to a denial of procedural due process of law. *Cummings* v. *Missouri*, 4 Wall. 277, 320-332; *Kentucky* v. *Jones*, 10 Bush. (70 Ky.) 725; *United States* v. *Lovett*, 66 S. Ct. 1073.

It is argued that the construction of the statute by the inferior federal courts, while concededly wrong and illegal, is a mere error of law which is reviewable only upon appeal and not by writ of habeas corpus. The construction of the statute so as to cut out the only defenses that the prisoners in these cases had was more than a mere error of law. It was an egregious, serious and fundamental error which violated the constitution. An error of a court committed in defiance of the constitution is as unconstitutional as is an error by a legislative body or an administrative agency. The construction of the statute so as to preclude the defenses was a denial of due process of law as is shown herein. But even if it be considered not a denial of rights contrary to the general terms of the due process clause of the Fifth Amendment the error of construction violated the provisions of the Constitution, which prohibits bills of pains and penalties. "No bill of attainder or ex post facto law shall be passed." (Article 1, Section 9, Clause 3)

* McVeigh, *v.* United States, 11 Wall. 259, 261, 267-268; Windsor *v.* McVeigh, 93 U. S. 274, 277, 278-279; Hovey *v.* Elliott, 167 U. S. 409, 413-415, 417-418; Bradstreet *v.* Neptune, 3 Sumn. (U. S.) 600; Ong Chang Wing *v.* United States, 218 U. S. 272, 279; Chicago M. & S. P. R. *v.* Minnesota, 134 U. S. 418, 456-457; United States *ex rel.* Trainin *v.* Carr (CCA-2) 144 F. 2d 944; Estep *v.* United States, 327 U. S. 114, concurring opinion of Mr. Justice Murphy.

The construction placed upon the act denied prisoners their rights to make their defenses. The denial of the right to make a defense allowed by law is a denial of a judicial trial. A denial of a judicial trial by Act of Congress and the denial of such right by a court in an illegal construction of an Act, constitutes a violation of the clause prohibiting bills of attainder and bills of pains and penalties.

Framers of the Constitution of the United States were well aware of the unjust consequences that would inevitably flow from the denial of judicial trials in this country. While at the time of the adoption of the Constitution some doubt was expressed as to the need for a specific prohibition on powers of Congress in this connection, to guard against the possibility of usurpation of the judicial function, the *attainder* clause was enacted in its present form without opposition. See *Debates on the Adoption of the Federal Constitution*, Jonathan Elliott, Washington, 1845, Vol. 5, p. 462, and Vol. 3, pp. 66, 67; *The Federalist*, No. 44 (James Madison) and No. 84 (Alexander Hamilton).

Recently the Court, in reaching back to *Cummings* v. *Missouri*, 4 Wall 277, had occasion to again reaffirm the doctrine which condemns the denial of judicial trials. An Act of Congress was held to be invalid as a bill of pains and penalties in *United States* v. *Lovett*, 66 S. Ct. 1073. A reference is made to the discussion in the opinions filed in this case for a more extensive discussion of the history of bills of attainder. See also the concurring opinion of Mr. Justice Black in *Keegan* v. *United States*, 325 U. S. 478, 495-498. A further discussion of the subject was made by Mr. Justice Black in his dissenting opinion in the case of In re *Summers*, 325 U. S. 561, 573. Reference is also made to the discussion on this subject appearing in the Brief for Petitioners filed in *Smith* v. *United States*, No. 66 October Term, 1945, and in *Estep* v. *United States*, No. 292 October Term, 1945, at pages 95 to 105, inclusive.

It is submitted that the specific provisions of the bill of attainder clause of the Constitution prohibit the conclusion that it is a mere error of law reviewable only upon appeal to deny the defenses urged by the pioneers in the convicting courts. It being an error of law which violates the constitutional provisions prevents the construction from being called a "mere" error of law. The error was grave enough to make void the judgments of convictions.

The doctrine of denial of defenses because of alleged contempt of law and flouting of the orders of administrative officers by a person, invoked by the convicting courts, has been condemned by this Court as a denial of constitutional rights. In *Hovey* v. *Elliott*, 167 U. S. 409, 413-415, 417-418, the Court reversed a judgment where the answer of defendant, his evidence and his defenses had been stricken because of his contempt of court. The Court held that the entry of the judgment without affording an opportunity to defend was a violation of his rights of due process. There the Court said:

"[A] more fundamental question yet remains to be determined, that is, whether a court possessing plenary power to punish for contempt, unlimited by statute, has the right to summon a defendant to answer, and then, after obtaining jurisdiction by the summons, refuse to allow the party summoned to answer or strike his answer from the files, suppress the testimony in his favor, and condemn him without consideration thereof and without a hearing, on the theory that he has been guilty of contempt of court. The mere statement of this proposition would seem, in reason and conscience, to render imperative a negative answer. . . . Can it be doubted that due process of law signifies a right to be heard in one's defense? If the legislative department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever to be heard, would it be pretended that such an enactment would not be violative of

the Constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and foundation of justice itself, has yet the authority to render lawful that which if done under express legislative sanction would be violative of the Constitution?" (*Hovey* v. *Elliott*, 167 U.S. 409, 413-418)

That the denial of the right to attack the orders because of their illegality is a denial of due process, is supported by *Windsor* v. *McVeigh*, 93 U.S. 274, 277-278. There it was said: "Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations." See also *McVeigh* v. *United States*, 11 Wall. 259, 267; *Bradstreet* v. *Neptune*, 3 Sumn. (U.S.) 600, where it is said: "It is as old as the law and never more to be respected than now, that no one shall be personally bound until he has had his day in court; by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination. It is judicial usurpation and oppression and never can be upheld where justice is justly administered."

In *McVeigh* v. *United States*, 11 Wall, 259, 267, the court said that when one is assailed by an indictment or proceeding in the United States District Courts "he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the right principles of the social compact and of the right administration of justice."

The Government in these cases attempts to absorb the shock of the impact of the *McVeigh* cases by stating that in those cases the accused was denied the right to speak at all in his defense. This argument of the Government is

a mere play upon words. It is specious and when considered in the light of realities is found to be factitious. What is the difference between the denial of the right to speak in one's behalf upon any tendered defense and the right to speak at all upon the only defense tendered or which could be tendered? There is no difference. The prisoners in these cases had their mouths shut, their hands tied and their legs hobbled as effectively by the holding of the convicting courts in these cases as did the accused in the *McVeigh* cases. The decisions in the *McVeigh* cases cannot be distinguished. The fact that they had the right to question the jurors and witnesses that appeared against them did not minimize the fundamental error of the court in cutting out their only defenses entirely from the cases. Certainly it is not necessary to show that the prisoners were denied all of their rights guaranteed by the Constitution before they can complain of the denial of one fundamental right secured by the Constitution. It is true that they enjoyed every right guaranteed by the Constitution except the only right that meant anything to them, namely, the right to make their defense. The other rights enjoyed by them upon their trials guaranteed by the Constitution did no good to them when the most important right, to wit, the right of defense was denied to them.

In *Rogers* v. *Peck*, 199 U. S. 425, 435, the court said that a defendant in a criminal case must be given an adequate and full opportunity to be heard in defense to an indictment.

In *Ong Chang Wing* v. *United States*, 218 U. S. 272, 279, it is said: "This court has had frequent occasion to consider the requirements of due process of law to criminal procedure, and, generally speaking, it may be said that if an accused has been heard in a court of competent jurisdiction, . . . with an opportunity to be heard, . . . then he has had due process of law."

In *Edwards* v. *United States*, 312 U. S. 473, the court held that the striking of a plea in bar because it was unmeritorious and could not be sustained in law or fact was a denial of due process and constituted reversible error.

The court, in *Dowell* v. *United States*, 221 U. S. 325, 330, held that an act whereby an administrative agency determined the facts of one's duty and the circumstances of his violation thereof, without an opportunity to be heard in his defense in court, was unconstitutional. Speaking of the constitutional provisions the court said: "It was intended to prevent the conviction of the accused upon depositions or *ex parte* affidavits, and particularly to preserve the right of the accused to test the recollection of the witnesses in the exercise of the right of cross examination."

In *Wong Wing* v. *United States*, 163 U. S. 228, the statute that permitted the immigration officer to exclude the alien by order rendered under administrative power, also allowed him the right to impose a penalty and punishment in addition. The law was declared invalid. The court said: "It is not consistent with the theory of our government that the legislature should, after having defined an offense as an infamous crime, find the fact of guilt and adjudge the punishment by one of its own agents." See also *Diaz* v. *United States*, 223 U. S. 442; *Lisemba* v. *California*, 314 U. S. 219, 236.

The federal judge of each district court in these cases refused to conduct a judicial trial. They proceeded to cut out all of the defenses. They tried the cases on an illegal theory, which confined the issue to whether prisoners submitted to inductio , similar to "trial by ordeal", and violated the due process clause of the Fifth Amendment, Clause 3 in Section 9 of Article I (prohibiting bills of attainder) and Article III investing judicial powers in the courts, not in administrative agencies.

Such illegal procedure caused the convicting courts to lose jurisdiction. They were ousted of jurisdiction to pro-

ceed further and pronounce sentence against prisoners. Such illegal action has been condemned thus: "A judgment obtained in violation of procedural due process is not entitled to full faith and credit when sued upon in another jurisdiction. *National Exchange Bank* v. *Wiley*, 195 U. S. 257; *Old Wayne Life Ass'n* v. *McDonough*, 204 U. S. 8, 23; *Baker* v. *Baker, Eccles & Co.*, 242 U. S. 394, 401. Moreover, due process requires that no other jurisdiction shall give effect, even as a matter of comity, to a judgment elsewhere acquired without due process. Restatement of Judgments, 11, Comment (c)." (*Griffin* v. *Griffin*, 66 S. Ct. 556, 560)

"Even though the court has jurisdiction over the defendant, and even though he is given notice of the action, a judgment against him is void if he was denied all opportunity to be heard. Notice to a defendant of the claim which is being made against him is of no value to him if he is denied all opportunity to defend the claim. This may happen where under a statute of the State a reasonable opportunity to be heard is denied. It may happen where in the particular action the conduct of the court is so flagrant as to deny him an opportunity to be heard. Thus, if the court arbitrarily strikes out any answer which the defendant makes to the claim and renders judgment against him, the judgment is void . . . " (Restatement of the Law of Judgments, American Law Institute 1942, pages 39-40, Section 6, Chapter 2)

The denial of the right to make any and all valid defenses upon a trial is equal to, if not worse than, a denial of the right to have counsel, which concededly would be ground for discharge on habeas corpus. The Constitution guarantees both fair trial and counsel. Without the granting of either, upon request not waived as here, the trial court loses jurisdiction to pronounce sentence. The provisions of the Constitution guaranteeing a judicial trial are equally as strong and respectable as is the provision with reference to the right to have counsel. If a defendant is deprived

of the right of counsel it does him no good to have a trial. If he is also deprived of a judicial trial and the right to be heard in his defenses it does him no good to have counsel. If habeas corpus attack can reach collaterally the denials of one it should reach the other because there is no difference between the two rights. Both are expressly secured by the Constitution. The decision of the United States Eighth Circuit Court of Appeals in *Manning* v. *Biddle*, 14 F. 2d 518, 519, is apposite here. Cf. *Potter* v. *Dowd* (CCA-7) 146 F. 2d 244.

It should not be as difficult as the Government would like to make it for the Court in determining whether the construction of the statute so as to cut out and strike the only defense that the prisoners had to make in the convicting court makes the judgment void. It seems that the many decisions that have heretofore been called to the attention of the Court should be sufficient to demonstrate the judgments are void and subject to collateral attack. But, if further argument or demonstration be needed to convince the Court of the contention here made by the prisoners it seems that the many cases involving collateral attacks upon the judgments of administrative agencies should be sufficient proof. Certainly if the denial of the right of a person to be heard in his only defense before an administrative agency makes the administrative judgment void, then for the same reasons the same denial of the same right by a court should make the judicial judgment void.

If the legislative department or the executive department should condemn a citizen after denying him the right to be heard in his only defense "would it be pretended that such . . . would not be violative of the Constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and fountain of justice itself, has yet the authority to render lawful that which if done by legislative or executive departments would be violative of the Constitution? If such power obtains, then the judi-

cial department of the government sitting to uphold and enforce the Constitution is the only one possessing a power to disregard it. If such authority exists, then in consequence of their establishment, to compel obedience to law and to enforce justice courts possess the right to inflict the very wrongs which they were created to prevent." (*Hovey* v. *Elliott*, 167 U. S. 409, 418) It seems therefore that the deprivation of rights by administrative agencies which has been considered by this Court to make the administrative judgment subject to collateral attack should be considered by the Court as grounds sufficient to make the judicial judgment subject to collateral attack, if it is shown that similiar denials were committed in the judicial proceedings.

Where a commissioner of immigration ignores the question presented and rejects evidence offered as did the trial courts here and takes away the right to be heard on the only issue involved it was held that the judgment of the administrative agency was void and subject to collateral attack. *White* v. *Chin Fong*, 253 U. S. 90. "If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given." (*Morgan* v. *United States*, 298 U. S. 468, 479-481) "The maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority." *Morgan* v. *United States*, 304 U. S. 1, 14-15.

"Many requirements essential in strictly judicial proceedings may be dispensed with in proceedings of this nature. But even here a hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and, if need be, by proof, however informal. *Pittsburgh etc. Railway Co.* v. *Backus*, 154 U. S. 421, 426; *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112, 171, et seq. It is apparent that

such a hearing was denied to the plaintiffs in error. The denial was by the city council, which, while acting as a board of equalization, represents the State. *Raymond* v. *Chicago Traction Co.*, 207 U. S. 20. The assessment was therefore void, and the plaintiffs in error were entitled to a decree discharging their lands from a lien on account of it." *Londoner* v. *Denver*, 210 U. S. 373, 386, Mr. Justice Moody. See also *Chicago, M. & St. Paul Ry. Co.* v. *Public Utilities Commission*, 274 U. S. 344.

Whereas misinterpretation of the law in reference to the essentials of a common law marriage by immigration officials caused them to reject pertinent evidence relating thereto there was not a full and fair hearing, contrary to the due process clause. Ex parte *Ver Pault* (C. C. A. 2d) 86 F. 2d 113. The failure to preserve a proper record of the evidence offered by a party to an administrative proceeding has been held a denial of due process making the judgment of the administrative agency subject to collateral attack. *Kwock Jan Fat* v. *White*, 253 U. S. 454, 464; *West Ohio Gas Co.* v. *Public Utilities Commission*, 294 U. S. 63, 68, 69, Mr. Justice Cardozo.*

Indeed this Court, speaking through Mr. Justice Reed, has declared: "The refusal to permit the accused to prove his defense may prove trivial when the facts are developed. Procedural errors often are. But procedure is the skeleton which forms and supports the whole structure of a case. The lack of a bone mars the symmetry of the body. The parties must be given an opportunity to plead and prove their contentions or else the impression of the judge arising from sources outside the record dominates results. The requirement that allegations must be supported by evidence tested by cross examination protects against falsehood.

* Cf. Myers v. Bethlehem Corp., 303 U. S. 41, 49; Shields v. Utah Idaho Railroad Co., 305 U. S. 177, 182; Opp Cotton Mills v. Administrator, 312 U. S. 126, 152-153; Power Commission v. Pipeline Co., 315 U. S. 575, 583-584; Amalgamated Workers v. Edison Co., 309 U. S. 261, 265.

The opportunity to assert rights through pleading and testimony is essential to their successful protection. Infringement of that opportunity is forbidden." *Edwards* v. *United States*, 312 U. S. 473.

To sum the matter up insofar as the decisions involving collateral attack of administrative judgments are concerned it is sufficient to say that the judgments of the courts are subject to the same scrutiny as are the orders of the administrative agencies. Therefore what this court said in *Eagles* v. *United States*, 67 S. Ct. 313, is applicable here. There it is said: "It is elementary that habeas corpus may not be used as a writ of error. *United States* ex rel. *Tisi* v. *Tod*, 264 U. S. 131; *Woolsey* v. *Best*, 299 U. S. 1. The function of habeas corpus is exhausted when it is ascertained that the agency under whose order the petitioner is being held had jurisdiction to act. If the writ is to issue, mere error in the proceeding which resulted in the detention is not sufficient. *United States* ex rel. *Tisi* v. *Tod*, supra. Deprivation of petitioner of basic and fundamental procedural safeguards, an assertion of power to act beyond the authority granted the agency, and action without evidence to support its order, are familiar examples of the showing which is necessary. See *Johnson* v. *Zerbst*, 304 U. S. 458; *Bridges* v. *Wixon*, 326 U. S. 135, 149."

There can be no question that the procedural irregularities upon the trial of the prisoners in the convicting courts were of such a nature or magnitude as to render the trials of the petitioners very unfair. Indeed the trials were violative of every fundamental safeguard of a full and fair hearing that are provided for in the Constitution.

Even assuming, *arguendo*, that prisoners had the opportunity of raising these objections by direct appeal to the circuit courts of appeals, yet they would not be precluded from raising constitutional questions upon petitions for writs of habeas corpus. Since the constitutional objections urged in the petition are so fundamental and of such great

magnitude, they cannot be waived by failure to appeal even if prisoners were represented by counsel. If the questions are such a nature that they can be considered on petitions for writs of habeas corpus, they cannot be waived even if the prisoners had failed to appeal. *Screws* v. *United States*, 326 U. S. 91.

It should be remembered that prisoners claim that the Act and Regulations, as construed and applied to them upon their trials in the criminal cases, are unconstitutional and void. It has heretofore been shown that the Act and Regulations, as construed and applied to deny prisoners a judicial trial are unconstitutional. It is fundamental that the writ of habeas corpus is available to determine the constitutionality of an act under which one is imprisoned. This Court in Ex parte *Siebold*, 100 U. S. 371, said:

"The validity of the judgments is assailed on the ground that the acts of Congress under which the indictments were found are unconstitutional. If the position is well taken, it affects the foundation of the whole proceedings. An unconstitutional law is void, and is as no law. An offense created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment. It is true, if no writ of error lies, the judgment may be final, in the sense that there may be no means of reversing it. But personal liberty is of so great moment in the eye of the law that the judgment of an inferior court affecting it is not deemed so conclusive but that, as we have seen, the question of the court's authority to try and imprison the party may be reviewed on habeas corpus by a superior court or judge having authority to award the writ. We are satisfied that the present is one of the cases in which this court is authorized to take such jurisdiction. We think so, because if the laws are unconstitutional and void, the Circuit Court acquired no jurisdiction of the causes. Its authority to indict and try the petitions

arose solely upon these laws." (Ex parte *Siebold*, 100 U. S. 371, 376).

There is no difference between the unconstitutionality of the law on its face and as construed and applied. While there is a distinction between the two, it is a distinction without a difference. In the case of a law unconstitutional on its face, when it comes from the legislature, no jurisdiction or authority whatever is conferred upon the court that invokes the law as a basis for jurisdiction of the proceedings before it. In the case of a valid law, unconstitutionally construed and applied by the court that assumed jurisdiction under the valid law, the jurisdiction or authority is lost when the unconstitutional interpretation and construction is applied upon the legislation by the court. So if a court acquires no jurisdiction of a law void on its face, of necessity it must lose jurisdiction under a law that becomes unconstitutional as construed and applied.

In *Johnson* v. *Zerbst*, 304 U. S. 458, 467, 468, this Court announced a principle and made a holding that is a precedent for the action petitioners request here. In that decision it is said:

". . . Of the contention that the law provides no effective remedy for such a deprivation of rights affecting life and liberty it may well be said—as in *Mooney* v. *Holohan*, 294 U. S. 103, 113—that it 'falls with the premise.' To deprive a citizen of his only effective remedy would not only be contrary to the 'rudimentary demands of justice' but destructive of a constitutional guaranty specifically designed to prevent injustice.

"A court's jurisdiction at the beginning of trial may be lost 'in the course of the proceedings' due to failure to complete the court—as the Sixth Amendment requires—by providing counsel for an accused who is unable to obtain counsel, who had not intelligently waived this constitutional guaranty, and whose life or liberty is at stake. If this requirement of the Sixth Amendment is not complied

with, the court no longer has jurisdiction to proceed. The judgment of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may obtain release by habeas corpus. A judge of the United States—to whom a petition for habeas corpus is addressed—should be alert to examine 'the facts for himself when, if true as alleged, they make the trial absolutely void.'" See also *Williams* v. *Kaiser,* 323 U. S. 471, 477; *Bowen* v. *Johnston,* 306 U. S. 19, 23-25.

Similarly in *Waley* v. *Johnston,* 316 U. S. 101, the court extended the writ and broadened its scope in order to permit a full inquiry into facts entirely *de hors* the record to show the illegality of a plea of guilty, thus placing the plea on the same footing as a confession obtained in the same manner by force and duress. It was said: "In such circumstances the use of the writ in the federal courts to test the constitutional validity of a conviction for crime is not restricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial court to render it. It extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights." (pp. 104-105) *.

Inasmuch as the judgments of conviction in these cases were not rendered by a state court but are by federal courts, the cogent reasons against interference with administration of justice in the state courts by habeas corpus in the federal courts are wholly inapplicable here. Ex parte *Royal,* 117 U. S. 254; In re *Lincoln,* 202 U. S. 178, 182; *Stevens* v. *McClaughry,* 297 F. 18 (CCA-8).

*. For a further discussion of the right to challenge judgments of conviction collaterally through habeas corpus in federal courts, the Court is referred to certain law review articles. 25 Boston U. L. Rev. 26-27; 40 Col. L. Rev. 535-537, 1006, 1028-1029.

It is clear that the prisoners have strongly overcome the presumption of regularity of the trials and proceedings under the indictments. It appears from the allegations and proof that the indictments, the judgments and commitments were void and that the district courts trying the indictments lost jurisdiction through illegal denial of the right to attack the draft board orders which was a gross violation of their constitutional rights.

The decisions in *United States ex rel. Lohrberg* v. *Nicholson* (CCA-4) 141 F. 2d 689 (certiorari denied 322 U. S. 744), *United States ex rel. Falbo* v. *Kennedy* (CCA-4) 141 F. 2d 689 (certiorari denied 322 U. S. 745), and *United States ex rel. Arpaia* v. *Alexander* (CCA-2) 146 F. 2d 847 *, are not apposite. In each of those cases the prisoner had not completed the selective process. The failure of each to report for and submit to a preinduction physical examination prevented the armed forces from determining whether he was acceptable for training and service through the screening process. None of those registrants had reached the point in the administrative process which qualified them to challenge the legality of the administrative orders.

Since the prisoners here had completed the selective process (upon reporting for and being accepted on a preinduction physical examination by the armed forces, as well as their acceptance upon going through the induction process when they reported in response to the order for induction to exhaust their administrative remedies) they are in position to challenge the administrative orders in defense to the indictments charging them with refusal to submit to induction. The denial of this right by the convicting courts entitles them to discharge on habeas corpus.

Mr. Justice Douglas, speaking for the Court in *Estep* v. *United States* (327 U. S. 114) recognizes that there

* See Note 17 of the majority opinion written by Mr. Justice Douglas in Estep v. United States, 327 U. S. 114.

is a distinction between the situation presented in the *Lohrberg, Falbo* and *Arpaia* cases, supra, and that presented upon a petition for habeas corpus where the prisoner had exhausted the selective process. In footnote 17 of the *Estep* opinion (pp. 428-429) he declares that, "It is true that after the conviction of the defendant in the *Falbo* case, his petition for a writ of habeas corpus was denied. *United States ex rel. Falbo* v. *Kennedy*, 4 Cir., 141 F. 2d 689. And in a like situation habeas corpus was denied in advance of the trial. *Albert* v. *Goguen*, 1 Cir., 141 F. 2d 302. But in those cases additional steps in the selective service procedure remained to be taken. Denial of habeas corpus followed by analogy to the familiar situations where other corrective procedures had been available which might have afforded relief from the orders complained of. See *Bowen* v. *Johnston*, 306 U. S. 19, 59 S. Ct. 442, 83 L. Ed. 455; *Ex parte Williams*, 317 U. S. 604, 63 S. Ct. 431, 87 L. Ed. 491; *Ex parte Hawk*, 321 U. S. 114, 64 S. Ct. 448, 88 L. Ed. 572. But in the present cases the registrants, as we have said, had pursued their administrative remedies to the end."

In prisoners' cases here no additional steps in the selective process remained to be taken. There was no other "corrective procedure" available to prisoners "which might have afforded relief from the orders complained of." They pursued the selective process to the very end as did Estep in the case of *Estep* v. *United States*, 327 U. S. 114.

The Government relies upon *Collins* v. *Johnston*, 237 U. S. 502, 507. That decision can be distinguished. The facts in that case are somewhat different from the facts in the cases at bar. There the prisoner was held under a judgment of a state court convicting him of perjury. Upon the trial of his perjury charge evidence was rejected because it was considered insufficient. In that case the convicting court did not hold that the defense was immaterial or that the prisoner had no defense against the indictment.

The rejection of the evidence in that case is very much like the rejection of evidence on self-defense offered in a murder case where the ground of rejection was that the evidence was insufficient.

Here the entire defense and issue of whether the draft boards' orders were invalid were excluded from the entire cases, it being held that there was no such defense available in the law.

The ruling of the convicting courts in the cases at bar is very much like a ruling of a district judge in a murder trial where it is held as a matter of law that self-defense is not available as a defense to a murder charge, thereby completely rejecting as immaterial the prisoner's defense. In such a case, there would be a denial of a constitutional right, as was conceded by the United States Attorney before the trial court in the *Sunal* case.*

Furthermore the *Collins* v. *Johnston* case can be distinguished because there the prisoner had raised the same contentions in a petition for writ of habeas corpus before the Supreme Court of California as well as upon a direct appeal from the conviction to the Supreme Court of California and thence to this Court. See *Collins* v. *O'Neil*, 214 U. S. 113. Furthermore, this Court found that there was no

* "THE COURT: What about Mr. Covington's analogy between this case and a case, for example, where a man is accused of having committed a murder and is not permitted to introduce any evidence of self-defense?

MR. GIVEN: Your honor, I think that the question there is, on that type of case, that the Court ousts its jurisdiction when it fails to grant the defendant his constitutional right, which is granted to him by the Constitution. Now, that is probably illustrated more clearly where the defendant is denied the right of attorney.

THE COURT: Well, we can see that those cases are exceptions to the rule because the Constitution, itself, in its terms gives him certain rights and if those rights are denied him at the trial, furnishes the basis for writ of habeas corpus after conviction but the right, here, is based on denial of due process and Mr. Covington argues that it is analagous to a case where the charge is murder and the defendant wishes to introduce a defense of self-defense and the court refuses to permit that defense to be made and instructs the jury that it cannot be made." [84-85]

merit whatever to the defense offered. Here this Court has held that the tendered defenses were valid. *Estep* v. *United States*, 327 U. S. 114. It should be remembered that what was involved in that case was a question of state procedure and the decision of the Supreme Court of California was binding upon this Court that the defense proffered was not a good one in defense to the indictment. Also *Collins* v. *Johnston* has been materially impaired by this Court's decision in later cases.*

Attention is called to *Rea* v. *McDonald* (CCA-5) 153 F. 2d 190, certiorari denied 66 S. Ct. 820, rehearing denied 66 S. Ct. 959. The decision in the *Rea* case conflicts with the decisions of the courts below on the availability of the writ of habeas corpus because of the extraordinary circumstances. Insofar as it affirmed the judgment dismissing the petition for the writ, which contained allegations identical to those in the petitions in these cases, the decision conflicts with the decision of the court of appeals in the *Kulick* case. The denial of certiorari does not import that this Court approved the decision of the court of appeals in the *Rea* case. In *House* v. *Mayo*, 324 U. S. 42, this Court said:

"The district court also referred to a denial by this court of a petition for certiorari, filed here after the denial by the Florida Supreme Court of one of the applications for habeas corpus. See *House* v. *Mayo*, 322 U. S. 710, 64 S. Ct. 1058. The district court thought that this was an expression of the opinion that no meritorious question is presented by the matters of which petitioner here complains. But as we have often said, a denial of certiorari by this court imports no expression of opinion upon the

* Waley v. Johnston, 316 U. S. 101; Holiday v. Johnston, 313 U. S. 342; Walker v. Johnston, 312 U. S. 275; Bowen v. Johnston, 306 U. S. 10; Johnson v. Zerbst, 304 U. S. 458; Mooney v. Holohan, 294 U. S. 103, 113; Cf. in this connection *Ex parte* Hans Nielsen, 131 U. S. 176, overruling *sub silentio Ex parte* Bigelow, 113 U. S. 328, as declared by the United States Court of Appeals for the District of Columbia in Clawans v. Rives, 104 F. 2d 240, 244.

merits of a case. See *Hamilton-Brown Shoe Co.* v. *Wolf Brothers,* 240 U. S. 251, 258, 36 S. Ct. 269, 271, 60 L. Ed. 629; *State of Ohio ex rel. Seney* v. *Swift & Co.,* 260 U. S. 146, 151, 43 S. Ct. 22, 24, 67 L. Ed. 176; *United States* v. *Carver,* 260 U. S. 482, 490, 43 S. Ct. 181, 182, 67 L. Ed. 361; *Atlantic Coast L. Ry.* v. *Powe,* 283 U. S. 401, 403, 404, 51 S. Ct. 489, 499, 75 L. Ed. 1142. . . .

"The decision of the district court is thus not supported by the grounds assigned for it, and should have been reversed by the court of appeals. And the judges of that court erred in not considering whether the case was an appropriate one for a certificate of probable cause, as they were authorized to do by 28 U. S. C. sec. 466, 28 U. S. C. A. sec. 466. We think that they also erred in not issuing the certificate." (*Ibid.* 521)

In further support of the fact that the denial of certiorari in the *Rea* case, *supra,* should not be accepted as ground for denial of the questions presented here, it should be observed that the questions presented in the cases of *Estep* v. *United States,* and *Smith* v. *United States,* 327 U. S. 114, were previously presented to the court in *Rinko* v. *United States,* 147 F. 2d 1. Petition for certiorari was denied, 325 U. S. 851, rehearing denied, 325 U. S. 894. See also note 15 of the majority opinion in *Estep* v. *United States.*

The petition for writ of certiorari in the *Rea* case, *supra,* was probably denied because of the grounds contained in the trial court's judgment, whereby it was found by the trial court that the petitioner Rea had waived his constitutional rights in the convicting court by failure to object to the rulings and actions of the convicting court.

TWO

Extraordinary and unusual circumstances in the law existed at the time of the convictions of these prisoners in these cases, justifying their failure to appeal and warranting their use of the writs of habeas corpus as a substitute for appeal, to review the unconstitutional denial of the defenses in the criminal trials of the prisoners.

In the first prosecutions under Section 11 of the Selective Training and Service Act of 1940 practically all of the judges of the district courts and all of the circuit courts of appeals except one held that the legality of an order of a draft board commanding a registrant to report for service could not be challenged in defense to the indictments.*

Following the decision of this Court in *Falbo* v. *United States*, 320 U. S. 549, as a result of an erroneous interpretation and construction of the Court's opinion in that case, all of the circuit courts of appeals and all of the district courts held that this Court, by the *Falbo* decision, had approved the holding of the courts that there could be no judicial review of a draft board order in prosecutions under Section 11 of the Act.

* The only court of appeals holding that the defense was available was the fourth circuit. Goff v. United States, 135 F. 2d 610; Honaker v. United States, 135 F. 2d 683. See also Johnson v. United States (CCA 8) 126 F. 2d 242, 247.

All such courts continued to hold that the only way that relief could be obtained from an illegal order was for the complaining registrant to submit to induction and thereafter seek review by writ of habeas corpus.* Even in situations where the selective process was completely terminated and the registrant was charged with refusal to submit to induction or with failure to remain at a civilian public service camp, the courts persisted in denying judicial review. *Smith* v. *United States* (CCA-4) 148 F. 2d 288; *Estep* v. *United States* (CCA-3) 150 F. 2d 768; *United States* v. *Rinko* (CCA-7) 147 2d 1; *Gibson* v. *United States* (CCA-8) 149 F. 2d 751. For almost two years follwoing the decision of this Court in *Falbo* v. *United States*, various petitions for writs of certiorari were submitted to this Court asking the Court to take jurisdiction and clarify the law as to when, where and how one charged with refusal to comply with the draft board orders could challenge such orders in defense to the indictment brought under Sec.

* Sirski *v.* United States (CCA-1) 145 F. 2d 749; United States *v.* Flakowicz (CCA-2) 146 F. 2d 874; United States *v.* Estep (CCA-3) 150 F. 2d 768; Smith *v.* United States (CCA-4) 148 F. 2d 288; Koch *v.* United States (CCA-4) 150 F. 2d 762; Fletcher *v.* United States (CCA-5) 129 F. 2d 262; Klopp *v.* United States (CCA-6) 148 F. 2d 659; United States *v.* Rinko (CCA-7) 147 F. 2d 1; Gibson *v.* United States (CCA-8) 149 F. 2d 751. These cases are taken from Mr. Justice Frankfurter's concurring opinion in Estep *v.* United States 327 U. S. 114, 66 S. Ct. 423, 435. See also note 2 thereof where the following additional cases are referred to: United States *v.* Kauten (CCA-2) 133 F. 2d 703; United States *v.* Nelson (CCA-2) 143 F. 2d 584; United States *v.* Grieme (CCA-3) 128 F. 2d 811; United States *v.* Bowles (CCA-3) 131 F. 2d 818; Goodrich *v.* United States (CCA-5) 146 F. 2d 265; United States *v.* Mroz (CCA-7) 136 F. 2d 221; United States *v.* Messersmith (CCA-7) 138 F. 2d 599; United States *v.* Daily (CCA-7) 139 F. 2d 7; United States *v.* Sauler (CCA-7) 139 F. 2d 173; United States *v.* Van Den Berg (CCA-7) 139 F. 2d 654; United States *v.* Fratrick (CCA-7) 140 F. 2d 5; United States *v.* Baxter (CCA-7) 141 F. 2d 359; United States *v.* Domres (CCA-7) 142 F. 2d 477; Bronemann *v.* United States (CCA-8) 138 F. 2d 333; Van Bibber *v.* United States (CCA-8) 151 F. 2d 444. See also Springer *v.* United States (CCA-9) 148 F. 2d 411 and Swingle *v.* United States (CCA-10) 151 F. 2d 512. About a hundred additional opinions of all the circuits could be added to this note.

tion 11 of the Act.* Even in two cases where the administrative remedies were completely exhausted the Court denied certiorari. *United States* v. *Flakowicz* (CCA-2) 146 F. 2d 874, certiorari denied 325 U. S. 851; *United States* v. *Rinko* (CCA-7) 147 F. 2d 1, certiorari denied 325 U. S. 851, rehearing denied 325 U. S. 894.

The effect of this growing mountain of erroneous unconstitutional statutory construction by the district courts and the circuit courts of appeals gave no grounds for Sunal or Kulick to believe, or that there would be any reason to suppose, that the courts of appeals would hear them sympathetically or rule in their favor or even that this Court would grant certiorari. The time for taking appeals by Sunal and Kulick had expired long before this Court granted certiorari in the *Smith* case on May 28, 1945, 325 U. S. 846, and the *Estep* case on October 8, 1945, 326 U. S. 703. In fact they could not be certain of the possibility of success upon appeal until this Court had decided that draft board orders could be challenged in defense to the indictment in the *Smith* and *Estep* cases on February 4, 1946, 327 U. S. 114.

A misinterpretation of this Court's decision in the *Falbo* case had "silenced whatever doubts may theretofore have been held by a few of the judges". (See concurring opinion by Mr. Justice Frankfurter in *Estep* v. *United States*, 327 U. S. 114, 66 S. Ct. 423, 435.) This uniformly accepted misinterpretation provided reasonable grounds to excuse Sunal and Kulick from appealing the judgments of conviction in their cases.

* United States *v.* Flakowicz (CCA-2) 146 F. 2d 874, certiorari denied 325 U. S. 851; United States *v.* Parsons (CCA-2) 146 F. 2d 874, certiorari denied 325 U. S. 851; Grieme *v.* United States (CCA-3) 141 F. 2d 495, certiorari denied 322 U. S. 744; Clayton *v.* United States (CCA-4) 141 F. 2d 494, certiorari denied 322 U. S. 745; Stull *v.* United States (CCA-4) 141 F. 2d 494, certiorari denied 322 U. S. 745; United States *v.* Rinko (CCA-7) 147 F. 2d 1, certiorari denied 325 U. S. 851, rehearing denied 325 U. S. 894.

Under this extraordinary circumstance the district judge and the circuit court of appeals in the *Kulick* case [54-56, 83-85] and the court of appeals in the *Sunal* case [104-108] properly concluded that extraordinary circumstances existed justifying the prisoners in not appealing and in resorting to the writ of habeas corpus in lieu of appeal after the obliteration of the mountain of erroneous interpretations of this Court's *Falbo* decision by circuit courts of appeals and the district courts.

This is an extraordinary circumstance very similar to that involved in *Bowen v. Johnston*, 306 U. S. 10. There the Chief Justice declared that the rule concerning the writ of habeas corpus not being a substitute for appeal or writ of certiorari "is not so inflexible that it may not yield to exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent." (306 U. S. 10, 27)

The extraordinary circumstance of the lower courts misinterpreting the law should not be considered that the prisoners here are of the opinion that the construction placed upon the Act was approved by this Court. Indeed the interpretation was not approved by the denial of certiorari. The denial of certiorari in all of the cases in which the erroneous interpretations were declared by the courts does not mean that the Court approved the statements in those cases. Indeed in most of the cases in which petitions for writs of certiorari were denied the administrative remedies had not been exhausted by reason of the failure of the registrants to complete the selective process. Therefore the statements by the inferior federal courts about the requirement that the registrant must first submit to induction as a condition precedent to judicial review by habeas corpus as the only remedy were dicta. Accordingly the denial of certiorari in those cases does not mean that there the construction of the Act by the lower courts had been approved by this Court.

The predicament into which the prisoners had been put by the uniformly erroneous interpretation of the Act and Regulations was an extraordinary circumstance which should justify the granting of the writ of habeas corpus to review the proceedings in the convicting court. But this extraordinary circumstance resulting from these holdings should not be considered as a final interpretation of the Act and Regulations. Indeed the erroneous interpretation was *ultra vires* and was no interpretation at all until adopted by this Court. In the circumstance no reasonable person could have been required to resort to appeal irrespective of how certain he was that the courts of the country were wrong. No reasonable person could suppose that the federal courts would change their minds. That this Court would grant certiorari was almost equally dark and hopeless when these prisoners were tried.

In a galaxy of cases involving varying circumstances, where constitutional rights have been denied prisoners upon their criminal trials, this Court has approved judicial review of the convictions on habeas corpus even though the same questions raised could have been urged upon appeal, writ of error or certiorari but which remedies were waived and not resorted to for one reason or another.

In Ex parte *Hans Nielsen*, 131 U. S. 176, a demurrer was wrongfully sustained to the prisoner's plea of former jeopardy made upon his former criminal trial. Failing to take an appeal from his second conviction he sought habeas corpus review of the erroneous denial of his plea of former jeopardy. "On appeal to the Supreme Court it was urged by the Solicitor General on behalf of the United States that the petition did not show want of jurisdiction, and that if the judgments of the court in sustaining the demurrer in the second criminal case was wrong it was an error which might render the judgment voidable, but not void for want of power, and that therefore the writ of habeas corpus would not lie because that writ should not be converted into

a mere writ of error." (*Clawans* v. *Rives*, 104 F. 240, 244, U. S. Court of Appeals for the District of Columbia, speaking of Ex parte *Hans Nielsen*, 131 U. S. 176)

This Court, in Ex parte *Hans Nielsen*, 131 U. S. 176, 184, 185, said: "A party is entitled to a habeas corpus, not merely where the court is without jurisdiction of the cause, but where it has no constitutional authority or power to condemn the prisoner, . . . In the present case, the sentence given was beyond the jurisdiction of the court, because it was against an express provision of the Constitution, which bounds and limits all jurisdiction."

In *Jones* v. *Kentucky* (CCA-6) 97 F. 2d 335, it was held that the erroneous reception into evidence of a confession obtained by force and violence contrary to the due process clause which could have been complained of on a direct appeal was ground for discharge upon writ of habeas corpus.

In other cases it has been held that where a trial was dominated by mob violence, which could have been presented to the trial court by motion for new trial and raised upon appeal, the writ of habeas corpus was available to determine the legality of the prisoner's custody. *Frank* v. *Mangum*, 237 U. S. 309, 330-331, 335-345; cf. *Moore* v. *Dempsey*, 261 U. S. 86, 91.

One put to trial for a felony by an information, contrary to the Constitution, instead of an indictment can raise the error of constitutional law upon a direct appeal. Also the amendment of an indictment by the prosecutor without a return to the grand jury can be complained of upon appeal. Nevertheless in situations like this where no appeals were taken the Court has held that these errors of law can be determined upon habeas corpus, in ascertaining whether or not the custody of the prisoner is illegal. Ex parte *Wilson*, 114 U. S. 417; Ex parte *Bain*, 121 U. S. 1.

Also the denial of trial by jury can be reserved easily and raised upon an appeal. Nevertheless where no appeal was taken the denial of this constitutional right has been

held to be ground for discharge upon habeas corpus. *Callan* v. *Wilson*, 127 U. S. 540.

Regardless of whether there has been an appeal or failure to raise the question upon appeal prisoners who illegally have been denied the assistance of counsel upon their criminal trials have been held entitled to the writ of habeas corpus. *Johnson* v. *Zerbst*, 304 U. S. 458, 463, 468; *Walker* v. *Johnston*, 312 U. S. 275.

Price v. *Johnston*, 125 F. 2d 806 (CCA-9) certiorari denied, 316 U. S. 677, and other cases of similar tenor are not applicable here. In that case the evidence received, although illegal, did not constitute a violation of the express provisions of the Constitution as here. Cf. *Jones* v. *Kentucky*, 97 F. 2d 335 (CCA-6). There is a vast distinction between an erroneous ruling on evidence which is received and the exclusion of all evidence in reference to a certain defense because the court illegally held there is no such defense in law as in the cases at bar. The exclusion of "impressive evidence" of insanity, denial of compulsory subpoena process, failure to give proper instructions, denial of a motion for new trial, newly discovered disqualification of jurors, and a defective verdict are points involved in the other cases relied upon by the Government in these cases.* None of these situations are in point, and none of them involved a deprivation of a right expressly guaranteed by the Constitution and which was serious. Here there was a denial of a fundamental right of self-defense in court.

Furthermore the line of cases relied upon by the Government cited here in the above footnote has become materially impaired by the later decisions of this Court which have

* Andrews v. Swartz, 156 U. S. 272; In Matter of Moran, 203 U. S. 96; Harlan v. McGourin, 218 U. S. 442; Charlton v. Kelly, 229 U. S. 447; *Ex parte* Harding, 120 U. S. 782; Valentine v. Mercer, 201 U. S. 131; McMicking v. Shields, 238 U. S. 99; Kaize v. Henry, 211 U. S. 146; *In re* Eckart, 166 U. S. 481; Felts v. Murphy, 201 U. S. 123.

followed the doctrine announced by Mr. Justice Holmes in his dissenting opinion in *Frank* v. *Mangum*, 237 U. S. 309, 346. The decisions relied upon by the Government have been materially weakened, if not destroyed, by the later decisions which have declared the writ of habeas corpus to be expanded rather than narrowed.

In cases where the rights have been attempted to be raised in criminal proceedings without success because of failure to preserve the question upon appeal or other technical difficulties, it has been held that the writ of habeas corpus in the federal courts is available to review convictions, even by state courts. *United States* ex rel. *Murphy* v. *Warden of Clinton Prison* (DC NY 1939) 29 F. Supp. 486.*

"Habeas corpus represents . . . a last line defense. Apparently in opposition to this remedy is much quoted dogma that habeas corpus is no substitute for appeal as of right, but this is enunciated where appeal is still available, and hence is not apposite in this situation. Supreme Court decisions give some indication that the writ will not issue where an appeal as of right was available, but not tried, and is now unavailable, but in the only clear case on that point the equities of the situation are not with petitioner. . . .

"When . . . habeas corpus is used when no other remedies exist, and particularly after an available review by the United States Supreme Court has been lost by inadvertence, most of the force of the above argument is lost. Counsel would not purposely forego the certainty of an immediate review on the merits by the Supreme Court for the uncertainty of a decision by a single district judge and the possibility that no appeal therefrom would be allowed. Hence it seems unlikely that this procedure would be deliberately resorted to as a means of delay. It would in no

* This case was affirmed *sub nom.* United States *ex rel.* Murphy v. Murphy, Warden (CCA-2) 108 F. 2d 861, certiorari denied *sub nom.* Murphy v. Warden of Clinton Prison, 309 U. S. 661

event entail an additional burden on the Supreme Court, and since counsel would not prefer this procedure, it seems that there would be too few of these cases to cause calendar congestion in the lower courts. The only remaining policy argument against granting the writ . . . is the inadvisability of giving a single district judge power to overturn a decision of the highest court of a state. But the validity of this argument loses force when it appears that the remedy is the only one existing. Indeed, the courts have indicated that a hearing on the merits outweighs this consideration by granting habeas corpus where no appeal as of right, but only certiorari, is available."

"Constitutional rights should not be denied for want of a remedy in the absence of compelling policy considerations to the contrary. It is submitted that when an appeal as of right to the United States Supreme Court existed, but because of counsel's error never materialized and is no longer available, the federal courts should inquire into possible violations of constitutional rights on habeas corpus." (40 COL. L. REV. 535, 537, 539-540).

The extraordinary situation of this Court's clarifying the uniform, nation-wide misunderstanding and erroneous interpretation of the Selective Training and Service Act by the lower courts is not to be likened unto a situation where there has been a reversal by this Court of one of its former decisions involving statutory construction. In *Warring* v. *Colpoys* (U.S. App. D.C.) 122 F. 2d 642, the court had before it a writ of habeas corpus involving a prisoner who had been convicted and jailed for contempt of court ensuing the prisoner's attempt to bribe a jury sitting in a case pending before the court. The bribery attempt occurred outside of the court. At the time of the conviction *Toledo Newspaper Company* v. *United States*, 247 U. S. 402, declaring such acts to be contempt of court was in effect. After the prisoner had been incarcerated for some time this Court, in *Nye* v. *United States*, 313 U. S. 33, reversed

its holding in the *Toledo Newspaper Company* case. The court of appeals, in the *Warring* case, held that the change in statutory construction did not entitle the prisoner to a discharge on writ of habeas corpus, and certiorari was denied, 314 U. S. 678.

The change of the construction of the statute involved in the *Warring* v. *Colpoys* case was entirely different from the reversal by this Court of the erroneous interpretation placed upon the statute by the lower courts in the *Estep* and *Gibson* cases. Upon the facts involved in the contempt case reviewed in the *Warring* it was concluded that the facts constituted contempt and upon this conclusion the prisoner pleaded guilty upon the trial and was sentenced. There was involved a mere error of law by the convicting court as to whether upon all the facts adduced the prisoner was guilty. In the *Warring* case the contention was that the undisputed facts alleged and proved showed that the prisoner was not guilty of contempt. Therefore the contention would be very similar to the case where in habeas corpus proceedings the prisoner contends that there is no evidence to support his conviction. This is an entirely different situation from the facts of the case at bar. Here the contention is made that the denial of the right to be heard as to a defense was a violation of the constitutional rights of the prisoner. In the *Warring* there was no denial of a right to be heard. If in the *Warring* case the prisoner had been denied the right to offer any evidence in his behalf then the situation would be different.

The decision of this Court in *Estep* v. *United States*, 327 U. S. 114, was not a reversal of the doctrine declared by this Court's decision in *Falbo* v. *United States*, 320 U. S. 549. (*Gibson* v. *United States*, 67 S. Ct. 301, December 23, 1946) The fact that this Court, in the *Smith*, *Estep*, *Gibson* and *Dodez* cases held that when draftees have completed the selective process they are in a position to challenge the indictment without taking further steps in compliance with

the order merely reversed the holdings of the inferior courts to the contrary in other cases. The decisions and holdings of the courts of appeals and the district courts construing the Act, resulting in the illegal convictions of Kulick and Sunal, is not analagous to this Court's reversal of the *Toledo* case (247 U. S. 402) by its decision in the *Nye* case (313 U. S. 33). The reason for this is that the erroneous construction and misinterpretation of the Act by the lower courts here are entirely *ultra vires*. An act of Congress cannot be said to have any established meaning until construed and interpreted by this Court. *Calhoun Gold Mining Co.* v. *Ajax Gold Mining Co.*, 182 U. S. 499. The full meaning of Section 11 of the Act did not become known until *Estep* v. *United States*, 327 U. S. 114. In fact in the cases at bar there has never been any change in the construction placed upon the Selective Training and Service Act by this Court.

The fact that the erroneous construction placed upon the Act in the dictum in scores of decisions by the lower federal courts was uniformly accepted by the bench and bar does not make it a construction of the statute of such character to deprive prisoners of their rights. Ignorance of the law is no excuse for parties to actions violating the law. Ignorance of the law is no excuse for the violation of parties' rights by judges of the courts. An unconstitutional construction of a statute and ruling by a judge is *per se* unlawful. The good faith belief of the judge does not make it any the less lawful. Certainly it is not necessary to prove that the judges acted in bad faith in construing the statute in order to prove that the prisoners were deprived of their constitutional right to a judicial trial.

As has been heretofore pointed out the construction of the courts and the almost uniform opinion of the bar as to the meaning of the Act was not binding on Congress. The imputation which they made to Congress was declared to be wrong by this Court in the *Estep* and *Gibson* cases.

Hence the interpretation put on the statute by the lower courts and most of the lawyers was not a statutory construction of the dignity and strength as that involved in *Warring* v. *Colpoys*, 122 F. 2d 642 (U.S. App. D.C.). The Act really had no meaning as to when, where and how a registrant could attack a draft board order in court until this Court spoke in the *Estep* and *Gibson* cases completing the interpretation that began in the *Falbo* decision by this Court.

The prisoners here concede that the convicting courts, not only had the authority, but had the duty of construing the statute in the same manner as did this Court. Those courts were called upon to properly construe the statute. They arbitrarily exercised the power and construed the statute in an unconstitutional manner. While a court may have the power to construe a statute, yet if, in exercising that power, it construes a statute in an unconstitutional manner or interprets it so as to deprive an accused person of his constitutional rights such illegal construction or ruling cannot be held to be a mere error of law purely because the court had the right to decide the question submitted. The speciousness of the argument is best demonstrated through an analogy. Every court has authority to decide whether it has jurisdiction. Now suppose a court has before it an action which is beyond its jurisdiction. Would a decision by such court that it had jurisdiction deprive a habeas corpus court of going into the matter on collateral attack? Certainly not. Then by force of the same reason the authority of the convicting courts to construe the statute does not preclude this court on habeas corpus to determine that the convicting court illegally and unconstitutionally exercised the power of construing the statute.

The holding in *Warring* v. *Colpoys*, 122 F. 2d 642, cannot be taken as an authority governing the situation presented here. In the *Warring* case there was no constitutional objection made. In the cases at bar the prisoners complained

that they were deprived of their defenses contrary to the due process clause and the bill of attainder clause of the Constitution. The holding in *Hovey* v. *Elliott*, 167 U. S. 409, is applicable here instead of the *Warring* decision. The Constitution being the real law (supreme over the interpretation of all courts), the unconstitutional construction placed upon the Act and Regulations by the inferior federal courts is not binding against this Court or the prisoners here. This is so even though it might be considered that the decisions of this Court in the *Smith*, *Estep*, *Gibson* and *Dodez* cases change the statutory construction of the Act and Regulations in a manner similar to that presented in the *Warring* case.

THREE

The scope of inquiry on the disposition of the writs of habeas corpus in these cases properly ought to extend to a determination of the validity of the draft board proceedings only in event this court concludes that the illegality of the proceedings in the convicting courts is not sufficient to justify a discharge of the prisoners.

It is true that the petitions for writs of habeas corpus in both of these cases attack the validity of the judgments of conviction on two grounds. The first line of attack against the judgments was that the judgments were void because of the trial courts' denying the prisoners their rights of procedural due process upon the criminal trials. The second line of attack against the judgments was that the judgments were void because the draft board orders on which the indictments were based are in excess of the jurisdiction of the draft boards because made without basis in fact and in violation of the registrants' rights of procedural due process.

Upon the hearing of the writs of habeas corpus in the district courts, and upon the argument and submission of the appeals in the courts below, the prisoners have contended that orderly procedure and due process of law in habeas corpus proceedings in these cases did not require the habeas corpus courts to review *de novo* the draft board proceedings. This was upon the assumption that if the conclusion was reached that the district courts denied the prisoners their constitutional rights upon the trial of their indictments it would not be necessary to go into the draft board proceedings. In other words, it has been the view of prisoners that although they attack the judgments of conviction on two grounds, if they are successful on the first ground it is unnecessary for the Court to pass upon the second ground.

Ordinary procedure, therefore, requires the Court in habeas corpus to avoid decision of unnecessary questions. Accordingly it will be unnecessary to decide whether the draft board orders are invalid in these proceedings if the conclusion is reached that the convicting courts violated prisoners' rights by refusing to consider the illegality of the draft board orders upon their defense against the indictments. However, in event the Court does not conclude that the denial of the right to make the defense is a denial of a constitutional right, then it will be necessary to consider the validity of the draft board orders.

In the petitions for writs of habeas corpus, and in their briefs filed in the courts of appeals below, the prisoners attacked the validity of the draft board orders. Upon the hearing of the writs of habeas corpus and in presentation of these cases to the courts of appeals the Government took the position that the scope of inquiry in these habeas corpus proceedings, if allowed at all, should be restricted to a *de novo* review of the draft board proceedings. The Government has repeatedly argued that, if it is found that the draft boards did not violate any rights of the prisoners,

it would be the duty of the habeas corpus court to hold that the detention of the prisoners was legal, irrespective of a finding that the convicting courts denied the prisoners their rights to challenge the validity of the orders in their defense against the indictments. In other words, the Government urged in the courts below that if the draft boards violated no rights of the prisoners then the violation of the prisoners' rights by the convicting courts was harmless error and wholly immaterial.

Upon its presentation of the issues to this Court the Government has materially altered its position taken in the courts below as to the procedure to be followed in these cases and as to the scope of review. The Government has now taken the view that the habeas corpus courts can inquire as to whether there was a denial of a constitutional right by the convicting courts of such a magnitude as to make the judgments of conviction void. In addition, the Government now suggests to the Court a slight variation of its original position on the scope of review. The Government now says that the request of the prisoners in their petitions for writs of habeas corpus to go behind the judgments of conviction and review the draft board proceedings is a novel one which is not supported by any authority. This is contrary to the view taken by the Government in the courts below. Then the Government further urges the position it has taken in the courts below, which is that upon the dictum of the decision in *Estep* v. *United States*, 327 U. S. 114, the writ of habeas corpus after conviction is available to inquire into the validity of the draft board proceedings.

This position of the Government on the scope of review in these cases is somewhat equivocal and vague. It is difficult for the prisoners in these cases, in view of the position taken in the courts below by the Government, to decide precisely just what is the Government's position now upon the scope of inquiry in these habeas corpus proceedings.

The trial courts in both these cases and the circuit court of appeals in the *Sunal* case were somewhat misled by the Government's argument in those courts as to the scope of review. They believed that if the draft boards violated no right of the prisoners the denial of the right to challenge the draft board orders in the criminal trials was harmless error.

The Second Circuit Court of Appeals in the *Kulick* case did not reach the question of the validity of the draft board order in that case because it concluded that Kulick had been unlawfully denied his right to be heard in the criminal trial in the convicting court. On this basis the court ordered him discharged. The prisoners in these cases are of the opinion that ordinary proceedings in habeas corpus cases and due process of law in habeas corpus cases approve the disposition that was made of Kulick by the court of appeals below. Prisoners suggest that both prisoners in these cases be disposed of by this Court in the same manner that the court below disposed of Kulick.

The prisoners here believe that the doctrine approved by the trial courts in these cases and the court of appeals in the *Sunal* case to the effect that denial of the right to challenge the draft board orders becomes harmless error when, upon a *de novo* review of the draft board proceedings, it is found that the draft board order is valid is wrong.

The argument of the courts that reached this conclusion in these cases is based upon two points urged to them by the Government in these cases. So as to aid the Court in escaping the erroneous conclusion to which those courts were driven by the Government, the prisoners here will discuss the two points urged by counsel for the wardens upon the courts below.

The first point, no prejudicial error was committed against the prisoners when the defenses were ruled out as immaterial because the draft boards acted legally, begs the

question. If there was denial of the right to be heard in their defenses, it would be a denial of due process of law. This denial cannot be cured by the holding of the habeas corpus courts that there was basis in fact for the finding that prisoners are not ministers of religion.

Suppose the convicting courts had denied prisoners the right to counsel. Suppose the courts put them to trial upon informations rather than indictments. Suppose the courts erroneously overruled pleas of former jeopardy. Suppose prisoners were convicted upon confessions illegally obtained, contrary to the Constitution. Can it be reasonably said that such denials could be cured by a finding of the habeas corpus courts that prisoners had no good defense to the indictments because their draft board files showed that they were not ministers of religion and were therefore guilty of having failed to submit to induction? Can it reasonably be said in any of these instances that the violation of the Constitution is harmless error because there was a basis in fact for the draft board orders or that they are guilty? The mere asking of the questions answers with a resounding no.

If prisoners were denied judicial trials and due process of law, as they claim, then there is only one method whereby that denial can be cured. That is to discharge the prisoners without prejudice to the rights of the Government to reindict or retry them so that upon another trial they will have opportunity to make their defenses, as the court of appeals held in the *Kulick* case. If one is denied the right of counsel, the right of trial by jury, or the right to trial under indictment contrary to the Constitution, such errors cannot be cured on the ground that they were harmless errors or that the prisoners are admittedly guilty, as the court below held in the *Sunal* case.

The position here taken that the loss of jurisdiction by the convicting courts cannot be restored by anything that

the habeas corpus courts may find about the validity of the administrative proceedings is supported by the views of Mr. Justice Holmes, expressed in *Frank* v. *Mangum*, 237 U. S. 309, 348. In his dissenting opinion there he said: "If the petition disclosed facts that amount to a loss of jurisdiction in the trial court, jurisdiction could not be restored by any decision above." (237 U. S. 348)

The efforts of the courts below in the *Sunal* case to hold that the action of the convicting court in refusing to consider or to permit the jury to consider the illegality of the administrative action cannot succeed. A similar attempt was made by the court of appeals below in *Smith* v. *United States*, 148 F. 2d 288. See the last point discussed in that opinion. The *Smith* case was a companion case to the *Estep* case in this Court. This Court reversed the judgment in the *Smith* case because the trial court refused to exercise its judicial function. This Court did not consider the error harmless, as did the Fourth Circuit Court of Appeals in its affirmance of the judgment. In the *Smith* case the trial court refused to permit the jury to pass upon the issues raised. In the *Smith* case the court limited determination of the issues to whether the defendant complied with the order. In these cases the court trying the indictments limited the determination to whether the petitioners complied with the orders to submit to induction. Moreover, in the *Smith* case, as well as in these cases, the convicting court did not pass upon the legality of the administrative determination.

If the courts below, under the writs of habeas corpus, can pass upon the validity of the administrative determinations after reviewing the draft board files, then the convicting courts should have done so. Inasmuch as the convicting courts failed to consider the legality of the administrative determinations, and failed to permit the jury, in each case, to determine the legality of the administrative action, the errors, which are denials of due process, cannot be cured

by the rationalizing of the courts below in these cases. In the same way, the error in the *Smith* case could not be cured by the rationalizing of the Fourth Circuit Court of Appeals. *Smith* v. *United States*, 148 F. 2d 288; see last paragraph of opinion. The contrary view taken by this Court is best expressed by the last sentence of its opinion in the *Estep* and *Smith* cases, 327 U. S. 114.

In *Gibson* v. *United States* and *Dodez* v. *United States*, 67 S. Ct. 301, a similar conclusion was reached: "This view requires reversal of the judgment in No. 86 and remanding the cause to the District Court for a further trial. Dodez insists, however, that we should go further and determine the case finally upon the merits. He urges that the evidence properly tendered and admissible upon the excluded defenses, as well as that adduced, would support no other verdict than one of acquittal and that therefore the trial court should have sustained his motion to dismiss the cause. Accordingly he asks for a judgment here directing that such relief be given. [¶] In the *Estep* and *Smith* cases, after holding that the petitioners had been wrongfully denied opportunity to defend by attacking the validity of their classifications, this Court reversed the convictions and remanded the causes for new trials, stating: 'We express no opinion on the merits of the defenses which were tendered. Since the petitioners were denied the opportunity to show that their local boards exceeded their jurisdiction, a new trial must be had in each case.' 327 U. S. at 125. Dodez' situation is identical, in this respect, with those of Estep and Smith. Accordingly we remand the cause, as was done in the *Smith* and *Estep* cases, for further proceedings in the trial court, without expressing opinion upon those further issues. . . . [¶] Gibson, like Dodez, and for similar reasons, insists that we should dispose of the case upon the merits, by examining and sustaining his defense. The same

course should be followed for Gibson in this respect as was directed for Dodez." 67 S. Ct. 301, 307, 312.*

If this Court was of the opinion that the performance of secular work by a minister of religion, or the failure of a minister to devote his full time (to the exclusion of all other activity) in the furtherance of his ministerial work or that there was basis in fact for the determination of the draft boards, would be grounds for holding as harmless error the action of the trial court in excluding evidence and in holding that the jury could not consider the alleged illegality of the draft board action, it would have so held in the *Smith* case.

It seems plain that if one is denied the right to make his defense that the action of the draft boards was illegal, such cannot be held harmless error because the courts below in the *Sunal* case were of the opinion that the draft board did not err in making its classification. If such can be accomplished, then the denial of the right of trial by jury can be held to be harmless error by a habeas corpus court on the ground that the undisputed evidence shows that the defendant is guilty. The effort of the courts below in the *Sunal* case to hold as harmless error the denial of due process by the convicting court is an effort to convert habeas corpus inquiry into a trial *de novo* of the guilt or innocence of the prisoner. This cannot be permitted.

A conclusion similar to that argued by the prisoners here was reached by United States District Judge J. Joseph Smith in the District of Connecticut in two cases.

In *United States* ex rel. *Arpaia* v. *Alexander*, decided September 27, 1946, 68 F. Supp. 820, in discharging the

* See slip opinion of this Court in the *Gibson* and *Dodez* cases, 11-12-22.

prisoner upon facts identical to the facts in the cases at bar, he said: "On these facts the Court cannot say that a claim that the Board had acted arbitrarily and without evidence in reaching its classification was a sham or frivolous defense which could not be considered by the trier in the criminal case. The petitioner should, therefore, be discharged from custody. The refusal of the Court to consider his evidence deprived him of a substantial defense which he was entitled to have the Court weigh."

In *United States* ex rel. *Flakowicz* v. *Alexander, Warden*, decided on December 4, 1946, in discharging the prisoner from custody upon facts identical to the facts in these cases, Judge Smith declared: "Denial of the opportunity to have the defense considered invalidates the court proceedings and it is unnecessary for this court, on habeas corpus, to proceed further and determine whether the action of the Selective Service board was in fact arbitrary or not founded on evidence. . . . Since the *Estep* case makes it plain that the defense should have been allowed in the criminal case, we do not here reach the question of review by the habeas corpus court, of the action of the board, since the custody attacked is ended by the invalidation of the criminal judgment. The granting of habeas corpus here by reason of the defect in the criminal trial, brought about by the *Estep* and *Smith* decisions, gives the Government the choice whether to re-try the petitioner on the present indictment, with the defense of arbitrary action of the board available to Flakowicz, or to present to the Selective Service board anew the question of the classification of the petitioner under whatever evidence may presently be available."

With respect to the second point that the conclusion contended for by the Government is dictated implicitly by the dictum in the *Estep* case, little need be said. The members of this Court know more about what the Court intended to hold in the *Estep* case than anybody else. But, taking the

language of the Estep opinion on its face and accepting the dictum referred to there for what it says, the conclusion cannot be reached that this Court intended to limit, in habeas corpus proceedings, the inquiry to a determination of the validity of the draft board proceedings.

It is true that the Court in the *Estep* opinion stated that if it should hold that the orders of draft boards could not be challenged in defense to indictments then the remedy of habeas corpus would be available after conviction and imprisonment to assail the order of the draft boards and to challenge their jurisdiction. It should be observed that the Court stated, however, that the remedy would be available *only in event the Court held* that a registrant could not defend on his criminal trial on the ground that the draft board order was illegal. The Court did not hold that the registrant could not defend. This Court held that the registrant could so defend upon the criminal trial. The Court having held in the *Estep* opinion that the defense was available upon the trial of the indictment, it is not reasonable to place upon the dictum of such opinion a construction which would limit the inquiry in these habeas corpus proceedings only as to the validity of the draft board proceedings.

There is certainly nothing in the *Estep* decision that would indicate that habeas corpus review of criminal proceedings under Section 11 of the Act should be limited and restricted any more than the scope of review allowed upon the hearing of a writ to review any other criminal proceedings. If a convicting court violated the law under the Act by denying one the right to challenge the validity of the draft board order, the inquiry should be as broad in such proceedings as in any other habeas corpus case where there is asserted a denial of due process of law by the convicting court.

It is only in event the Court decides that there was no violation of a constitutional right by the convicting courts

of such magnitude as to make the judgments of conviction void that this Court is required to go into the validity of the draft board proceedings.

Prisoners here filed "double-barreled" petitions for writs of habeas corpus. They aimed their attacks at both props relied upon by the Government to support the judgments of conviction. One prop that the Government relies upon is that the proceedings in the district court did not make the judgments void. If the prisoners are successful in knocking the first prop down, the judgments of conviction must fall. Anyway, in such event, it is unnecessary to knock down the second prop.

In case the prisoners are not successful in getting this Court to knock down the first prop because of the illegality of the court proceedings, then it becomes the duty of the Court to decide whether or not the second prop should be knocked down because of the illegality of the draft board proceedings.

An inquiry into the illegality of the draft board proceedings in these cases certainly ought not to be for the purpose of deciding whether or not the convicting courts committed error in excluding from consideration of the courts and juries the validity of the draft board proceedings. In these habeas corpus proceedings the unconstitutionality of the action of the convicting courts in excluding these issues from the cases do not depend upon a subsidiary inquiry as to whether the draft board proceedings are void.

However, the assault which the prisoners make against the judgments of conviction in an effort to knock down the second prop supporting the judgments is based entirely upon whether the district courts' judgments must fall because of the invalidity of the draft board orders. If it can be made to appear that the draft board orders supporting the indictments are void, then it must be concluded that the indictments likewise must fall.

If the indictments must fall so also must the judgments of conviction. This position is not at all anomalous, nor is it strange or novel. Indeed in habeas corpus proceedings the courts many times have gone behind the judgment of court martial proceedings to ascertain whether the armed forces had jurisdiction over the prisoner. The habeas corpus proceedings in these cases, assuming for the purpose of argument that the proceedings of the convicting courts did not deprive the prisoners of a constitutional right, ask the Court to inquire as to whether the district courts had jurisdiction to entertain the prosecutions because the administrative agency and the Department of Justice had no jurisdiction to institute the delinquency proceedings in the convicting courts to begin with.

The mere fact that the Second Circuit Court of Appeals failed to pass upon the validity of the draft board proceedings in the *Kulick* case, which the district court considered, in no way precludes this Court from reviewing the draft board proceedings, if this Court concludes that it is the proper issue in these cases.

This Court can pass on the validity of the draft board proceedings in the *Kulick* case even though the court of appeals did not do so. It is not necessary to vacate the judgment and send the case back for reconsideration by the court of appeals as was done in the case of *United States* v. *Sheridan*, 67 S. Ct. 332. In appeal of habeas corpus proceedings, the procedure of this Court is altogether different from the procedure of the Court in other cases. In other cases where the court of appeals fails to pass on a question it is proper to vacate the judgment and send the case back to the lower court for reconsideration. But in habeas corpus proceedings this Court is authorized to dispose of the prisoner as law and justice require. The Court is therefore enabled to render the type of judgment that the courts below should have rendered upon the entire record made without remanding the case for reconsideration

by the court below. This is uniformly the rule in all habeas corpus proceedings coming from lower federal courts.

The failure of the Second Circuit Court of Appeals to pass upon the validity of the draft board proceedings was not reversible error because the judgment of that court can be affirmed on the ground that the denial of Kulick's right to make his defense to the indictment in the district court constituted a deprivation of a constitutional right which made the judgment void. It is a fundamental proposition that even though the reasons discussed by a court below for the judgment which it renders are invalid, nevertheless if the judgment can be supported on any other ground it should be approved by this Court.

It has never been questioned that a federal court can by habeas corpus inquire into the legality of the restraint of one imprisoned by a court-martial order. If the court finds that the armed forces do not have jurisdiction because of the failure of the prisoner to be properly enlisted, or refusal to submit to induction, or illegality of the administrative action that forces the prisoner into the armed forces, the petitioner will be discharged from custody.—*Ex parte Reed*, 100 U. S. 13; *In re Grimley*, 137 U. S. 147; *In re Morrissey*, 137 U. S. 157; *Johnson* v. *Sayre*, 158 U. S. 109; *Billings* v. *Truesdell*, 321 U. S. 542; *United States ex rel. Phillips* v. *Downer* (CCA-2) 135 F. 2d 521; *United States ex rel. Trainin* v. *Cain* (CCA-2) 144 F. 2d 944; *United States ex rel. Beye* v. *Downer*, (CCA-2) 143 F. 2d 125.

In *Ver Mehren* v. *Sirmyer* (CCA-8) 36 F. 2d 876, it was held that the prisoner was entitled to discharge under the writ of habeas corpus, although restrained by a court-martial decree, where it appeared that the draft board did not comply with the Regulations in classifying him as liable for induction. In the *Ver Mehren* case, "The Court thus went behind the court-martial back to the Board, and having found that the Board had improperly inducted him, wiped out the court-martial conviction entirely. In other

words, after the petitioner had actually been convicted by court-martial, the court proceeded to review, not his conviction, but the legality of the action of the Selective Service Board, in inducting him, in the first instance." *Ex parte Stewart*, 47 F. Supp. 410.

In the habeas corpus proceedings instituted by prisoners it is the duty of the Court to inquire into the want of authority of the draft boards to set in motion the delinquency proceedings under the Act. If they had no jurisdiction, then the convicting court had no jurisdiction. Their action in excess of their authority in ordering a minister of religion to do training and service vitiated the subsequent proceedings resulting in the imprisonment of prisoners. The wardens acquired custody over prisoners by virtue of the Act and Regulations. So also, under the Act, a prison-keeper for the armed forces acquires jurisdiction over an inductee who defies the orders of the military authority. It is the administrative agency created by the Act and functioning under the Regulations which sets in motion the chain of events that results in the imprisonment of the minister of religion whose claim for exemption has been ignored. In either case the want of authority on the agency defeats the claims of the prison-keeper to custody of the prisoner.

It is said by Judge Yankwich in *Ex parte Stewart*, 47 F. Supp. 410, that there is a "need for a competent authority to question the possible arbitrariness of a board" and that the need "is clearer, because of the fact that no questioning of the action of the Board is allowed in a prosecution resulting from disobedience of any of the orders issued by the Board. Were it otherwise, we should have an instance,—which our law abhors,—of finality of administrative action which might leave a person at the mercy or caprice of a lay board, without the power to review arbitrariness, abuses of authority or even lack of jurisdiction. Such a situation is inconsistent with the doctrine of limited

sovereignty which is at the basis of our constitutional structure, and which postulates the existence in the individual of certain rights which he can assert against the sovereign power itself. And, perhaps the most fundamental of these rights is the right of freedom of person, of which the individual cannot be deprived, even in wartime, except through machinery which guarantees the fundamentals of due process. (See Yankwich, *The Constitution and the Future*, Ch. III). . . .

"Suppose he stands convicted; would he be in a better position to raise the question whether he was legally inducted by suing out a writ against the warden of the penetentiary? Most certainly not. Then, why should he wait? The only real question here is: Is the petitioner being deprived of his liberty by virtue of the action of the board? The answer is: Yes, because he has been arrested for failure to obey the order of the board. And he does not have to wait until he has been convicted to challenge that order. *One may raise the question of due process after conviction.* But a person need not wait until then." (YANKWICH, J.; in *Ex parte Stewart*, 47 F. Supp. 410) [Emphasis added]

"In other words, my view is that, if an inductee is restrained of his liberty, in consequence of what he alleges to be the arbitrary action of a Selective Service Board, no matter at what state he is restrained, he may, by writ of habeas corpus, question whether there was evidence to sustain the action of the board. He does not have to wait until he is inducted, and direct the writ to the Commanding Officer. Nor does he have to risk conviction, desertion or court-martial." (*Ex parte Stewart*, 47 F. Supp. 410, at p. 414.) See also the opinion of the district court in *Goodwin v. Rowe*, 49 F. Supp. 703.

The Government has many times argued that if a registrant had submitted to induction at the camp he could have obtained judicial review of his claim for exemption and the illegal action of the administrative agency in rejecting it.

Even if he defied the military authority after induction into the armed services and was sentenced to prison by court-martial he still could challenge the authority of the administrative agency and show the illegality of the order to submit to induction. *A fortiori,* if defiance of the military authority after induction does not preclude judicial review by writ of habeas corpus, then defiance of the administrative agency by refusing to submit to induction does not preclude similar judicial review by writ of habeas corpus in behalf of one imprisoned under the criminal sanctions clause of the Act for such refusal to submit to induction. The indictment and judicial proceedings thereunder have no stronger armor to resist the writ of habeas corpus than do the court-martial proceedings. The writ penetrates both to reach the vulnerable arbitrary order of the administrative agency that precipitated the attack against the prisoner.

FOUR.

The holdings of the trial court in the Kulick case and both of the courts below in the Sunal case that the orders of the draft boards were lawful are erroneous. The orders are illegal as a matter of law.

A

The denials of the claims for exemption as ministers of religion made by the prisoners and their classifications by the draft boards were arbitrary, capricious and in excess of the jurisdiction of the draft boards, because they were without basis in fact.

It becomes necessary to consider the validity of the draft board determinations in these cases only in event the Court adopts the conclusion that the scope of inquiry in these cases should be limited exclusively to the determination of whether the draft board illegally denied prisoners any of their rights under the Act and Regulations or in

the event the Court, after reviewing the proceedings in the convicting courts, reaches the conclusion that there was no denial of a constitutional right which is of such magnitude as to make the judgments of conviction void. In event this Court reaches the conclusion that the scope of inquiry in these cases properly extends to review the draft board proceedings if the convicting courts' proceedings are found to be valid, it will become necessary to pass on the questions raised under this point of the argument. Moreover, if the Court reaches the opinion that it may inquire into the validity of the draft board proceedings in order to ascertain whether or not harmless error was committed by the convicting courts, then of necessity it must consider the discussion under this point. Of course, if this Court reaches the conclusion that the scope of inquiry in these habeas corpus proceedings ought to be limited exclusively to a determination of whether the convicting courts unlawfully denied prisoners the right to be heard as to their defense, then it will become unnecessary to consider the validity of the draft board determinations or the argument made under this point.

The undisputed evidence in these cases shows that the prisoners prior to their classifications and trials were full-time pioneer missionary evangelists. Their primary occupation was that of ministers of the gospel. Each devoted the full amount of time required for such missionary evangelists. Their lives are as much devoted fully to the performance of their ministry as are the lives of judges, congressmen, governors, members of the state legislatures and the orthodox recognized clergy fully devoted to the performance of their respective duties, all of whom have been excused from the performance of training and service under the Act.

In the case of Kulick the Government relies upon a number of diversified factors for its contention that the prisoner was legally classified by his board. Some of such

factors will be stated and analyzed to show that they have no material bearing upon the status of Kulick under the Act. The grounds mentioned by the Government do not justify the denial of the claim for exemption as a minister that was made by Kulick.

It is mentioned that Kulick was studying for the ministry when he was from 11 to 16 years of age and began to preach as a part-time minister at the age of 16 in 1939. It is said that such facts justified the denial of the exemption claim in 1944. His former status had nothing to do with the action of the board in 1944. Moreover, this fact was before the board in 1943 when the board granted him his exemption. Being before the board in 1943 it could not be considered as a new circumstance justifying the change of classification in 1944. The youthfulness of any of Jehovah's witnesses, as prisoners were when they began their ministry, does not affect their qualifications when they filed their questionnaires. If they are old enough to be taken into the armed forces and assume such responsibilities, they should be old enough to be ministers. The history of their preaching at an early age is not unusual to true followers of Christ. Their Christian parents brought them up "in the nurture and admonition of the Lord" and put them into the "temple service" or preaching at an early age, as required by Jehovah and as commanded in His statutes recorded at Deuteronomy 6:4-7. See Ephesians 6:1-4: "Children, obey your parents in the Lord: for this is right. Honour thy father and mother; which is the first commandment with promise; that it may be well with thee, and thou mayest live long on the earth. And, ye fathers, provoke not your children to wrath: but bring them up in the nurture and admonition of the Lord." See also Ecclesiastes 12:1; Psalm 71:17; Genesis 18:19.

Timothy was ordained to preach as a disciple when but a small boy. (Acts 16:1-3) Paul, the apostle, wrote this "son of faith" thus: "Let no man despise thy youth; but

be thou an example of the believers, in word, in conversation [conduct], in charity [love], in spirit, in faith, in purity." —1 Timothy 4:12; 2 Timothy 3:15; 1 Corinthians 4:17, *American Standard Version.*

Samuel, the prophet, was consecrated for service in the temple when very small and of tender age.—1 Samuel 1:24; 2:11, 28.

Christ Jesus, when but twelve years of age, was already about his "Father's business", discussing the Scriptures. (Luke 2:46-49) When preaching the gospel later on, He said: "Suffer little children to come unto me, and forbid them not: for of such is the kingdom of God." (Luke 18:16; see also Matthew 18:1-6) Psalm 8:2: "Out of the mouth of babes and sucklings hast thou ordained strength"; Psalm 148:12, 13: "Both young men, and maidens; old men, and children: let them praise the name of the Lord: for his name alone is excellent; his glory is above the earth and heaven." —Proverbs 8:32.

Regardless of the age at which the prisoners began their ministry, there is nothing to show that they were disqualified to act as ministers of Almighty God at the time of their classification and, as such, were entitled to complete exemption.

It is argued further by the Government that Kulick had full-time secular employment as an industrial worker which he kept up until shortly after he registered in 1942. It was not what his status was prior to or at the time of his registration that determined his rights under the Act and Regulations. It was what his occupation and status was on the date of the final classification that determines the legality of the action of the board. This would also apply to the objection made that Kulick did not become a pioneer or full-time minister until one day after he registered with his local board. The fact is that he was a full-time pioneer minister devoting 150 hours per month to his ministry at all times since his classification in class 4-D as a minister.

It was his status at and since his exemption as a minister and on the date of the unjustified change from an exempt status to that of a non-exempt status that really counts.

In the case *United States ex rel. Hull* v. *Stalter* (CCA-7) 151 F. 2d 633, the same facts were urged by the Government. There it was contended that Hull had full-time secular work until after he filed his questionnaire, following his registration. Moreover, it was urged that he did not go into the full-time ministry until after he saw he was about to be drafted. Also it was contended, as is usual for the Government to contend in every one of the cases involving Jehovah's witnesses, that Hull did not have his name on a list. The court found that it was the status of the registrant at the time of the final classification rather than at the time of registration that determined the validity of the order. In that case the court said:

"We see no reason why a registrant with a non-exempt status at the time of registration should not subsequently be permitted to show that his status has changed or, conversely, why one who is exempt at the time of registration should not afterwards be shown to be non-exempt. . . . The point perhaps is better illustrated by referring to certain officials who are deferred from military service while holding office. Suppose a registrant who held no office at the time of his registration and was therefore liable for military service should subsequently be elected or appointed judge of a court or any other office mentioned in the Act. We suppose it would not be seriously contended but that he would be permitted to show his changed status any time prior to his induction into service and therefore be entitled to deferment. And we see no reason why a registrant claiming to be exempt as a minister should not be classified according to his status at the time of his final classification rather than at the time of registration."

It is urged that the failure of Kulick to inform the board that he was devoting about two hours per week to

modeling was justification for the change in his classification. This is a very specious and factitious argument. If the mere devoting of two hours per week or even seven hours per week to modeling would justify the taking of his exempt classification away from him then all of the exempt persons and deferred persons under the Act would be in a very insecure position. It is not the incidental work that Kulick did on the side to earn a living that determined his right to the exemption. It was whether he had regularly and faithfully discharged his duties as a full-time pioneer missionary evangelist that settled the matter. The undisputed evidence and the record show that he was at all times faithfully preaching 150 hours or more per month. It is a distortion of the record to say that two hours per week devoted to secular work to earn a living prevented him from doing his ministry. Even seven hours per week devoted to such modeling work would not and did not affect his ministry status. The performance of his secular work was wholly immaterial to his ministerial status and therefore it was not necessary for him to notify the board of such work. He was required to notify the board of only such facts as would affect his exempt status, such as if he had quit the ministry or changed his profession and occupation. His vocation was that of a full-time missionary evangelist. It has never changed since the date of his being declared exempt by the local board in 1943. His avocation was part-time modeling in his spare time from his ministry duties. The unreasonable contention made by the Government concerning the time spent in his avocation places an arbitrary construction upon section 5 (d) of the Act so as to result in injustices. Suppose every person who was entitled to exemption or deferment under the Act should be denied their rights because of pursuing an interesting hobby in his spare time. Such would make a mockery out of the law and lead to unreasonable results. There is no evidence that Kulick pursued the ministry as an avo-

cation. It was his life-time work and occupation and he was entitled to pursue it without telling or being required to tell the draft board of what he did in his spare time.

Much emphasis is placed upon the fact that Kulick was justifiably changed from 4-D to 1-A because of the fact that upon the hearing, (following the complaint by telephone from a clerk of another board) it is asserted that upon the hearing he was evasive about his modeling and for that reason he was justifiably changed. It is claimed that his testimony about what he did with his time was not satisfactory. To begin with, the inquiry by the board showed that they denied his claim for exemption because he had an avocation or did something other than preaching in his spare time. This was a wholly arbitrary and unreasonable basis for taking his exempt classification away from him. The board was not interested in whether he devoted his full time to his ministry. Indeed the board did not find and could not find upon the undisputed evidence before them that Kulick did not faithfully and fully discharge his duties as a full-time pioneer. There is no evidence, and there was no contention, that he was not a full-time pioneer minister. The very most that can be made of the evidence, viewing it most favorably to the Government, is that at times he earned as much as $35.00 per week from his modeling work. Assume that he earned this much every week it still would not prove that the modeling work was a vocation. It could not be shown that the time devoted to earning that much money a week materially prevented him from performing his ministry duties. He did not admit that he earned that much. His undisputed testimony is that he devoted only about two hours per week to modeling. But even if he earned $35.00 per week in the modeling work it still would be an avocation to him because he earned $7.50 per hour in that work. At $35.00 per week he would be required to devote only about four or five hours per week. It is unreasonable to say that if

a minister should devote as much as four or five hours per week to an avocation he would be denied the exemption that his vocation entitled him to.

The real reason that Kulick was changed from his exempt classification as a minister was because of the false telephone report that when he was not modeling in an army uniform he was sitting around his home. This hearsay report was false as to his sitting around his home when not modeling. It was relied upon by the board. Moreover, the board illegally found that he was inconsistent in claiming exemption from training and service and in wearing an army uniform while carrying out his avocation. This finding was arbitrary and capricious. There is nothing inconsistent in a minister's wearing an army uniform or any other kind of a uniform in the pursuit of an avocation as a model. It was unreasonable for the board to decide his case on any such basis. The prejudice of the board on this issue entirely blinded them from the real consideration as to whether he was in truth and in fact devoting his full time to the pursuit of his ministry. There was no evidence whatever to dispute the proof showing that he was. The finding of the board was without basis in fact and arbitrary and capricious.

The fact that Kulick and Sunal incidentally performed secular work in no way interfered with or prevented them from performing their duties as ministers of religion. The source of financial revenue of persons excused by the Act from the performance of training and service is wholly irrelevant and immaterial to the exemption and deferment granted by Congress.

The fact that a judge of a court may reside on a farm or ranch and/or operate it during his term of office in no way affects the statutory deferment as long as he fills the office of a judge. The fact that a governor of a state may own and operate some commercial business in no way weakens his claim for deferment under the Act. That a

congressman may maintain a law office and carry on a lucrative practice while serving in the Congress in no way estops him from claiming the deferment granted by the Act. That a wealthy clergyman may devote all of his spare time to the caring of investments in bonds, stocks, real estate and other enterprises in no way deprives him of his right to claim exemption under the Act as long as he is recognized by his organization as a minister of religion and teaches and preaches regularly the doctrines and principles of a recognized religious organization.

The mere fact that a poor preacher of a financially weak congregation is required to perform secular work during the week to support himself in the ministry does not bar him from claiming the exemption as a minister of religion as long as he regularly and customarily teaches and preaches the doctrines and principles of a recognized religious organization. In determining whether or not there is basis in fact for a draft board determination denying a claim for exemption or deferment under the Act cannot be supported solely by a finding that such person had other activities on the side that would not, within themselves, entitle such person to exemption or deferment. If the facts establish that such person comes within the exemption or deferment granted under the Act, incidental activities not entitling him to exemption or deferment are wholly irrelevant and immaterial.

Denial of exemption or deferment upon these irrelevant and immaterial considerations would be undoubtedly contrary to law, arbitrary and capricious and without basis in fact, thus establishing that the order denying the claim is in excess of the jurisdiction of the draft board. The error and trap into which the Government and the courts below, as well as many other courts, have fallen in these cases, is the result of pursuing these very irrelevant and immaterial considerations.

Kulick's previous secular employment, his youthfulness when he undertook study of the ministry and when he became a minister, and the nature of his preaching activity had all been before the board when it granted him exemption. It cannot be argued that these considerations were justification of the change in his classification.

The holdings of the draft boards in these cases are in direct conflict with the holding of the Seventh Circuit Court of Appeals in *United States* ex rel. *Hull* v. *Stalter,* 151 F. 2d 633.

Moreover, the draft boards' holdings are out of harmony with the dictum expressed on the same question by other circuit courts in *Lehr* v. *United States* (CCA-5) 139 F. 2d 919, 921-922, and *United States* ex rel. *Trainin* v. *Cain* (CCA-2) 144 F. 2d 944, 949.

Also, the draft boards' holdings, in effect, that activity of prisoners here was nothing more than that of lay workers of a religious organization and was not preaching as a minister, is directly in conflict with decisions in *Murdock* v. *Pennsylvania* (1943) 319 U. S. 105, 106-109, 110, 111, 117, and *Follett* v. *McCormick*, 321 U. S. 573, where facts in reference to the ministerial activity were identical with facts here. In those decisions it was held that the activity of Jehovah's witnesses occupied the same high estate as do orthodox preaching from the pulpit. Furthermore, it was held that the preaching activity of Jehovah's witnesses was more than preaching. It was a combination of pulpit preaching and evangelism.

Additionally, the draft board's decision interpreting the Act and Regulations is in direct conflict with the administrative interpretation placed upon the Act and Regulations by the National Headquarters of Selective Service System in State Director Advice 213-B, and Opinion No. 14. (Sunal's Exhibit C; Kulick's Exhibit 2) The National Headquarters says that "the *regular* discharge of his duties as a minister is a most important factor in determining whether a regis-

trant should be classified" as a minister of religion. (Emphasis added) (Sunal's Exhibit C, Advice No. 213-B)

The draft boards' construction of the Act and Regulations contradicts that statement of advice by National Headquarters.

Again the National Headquarters says that the "historic nature of the ministerial function of a registrant's *own religious organization must be taken into consideration in each individual case.*" (Emphasis added) (Sunal's Exhibit C, Advice No. 213-B)

That statement of advice by National Headquarters also is contradicted by the draft board in construing the Act and Regulations.

Still more, National Headquarters holds that performance of secular work does not deprive a minister of his right to exemption, by saying, "In some churches both practice and necessity require the minister to support himself, either partially or wholly, by secular work." (Sunal's Exhibit C, State Director Advice No. 213-B)

The draft board's construction of the Act and Regulations contradicts also that statement of advice by National Headquarters.

And, finally, National Headquarters of the Selective Service System specifically advises all draft boards that whether one of Jehovah's witnesses is to be classified as exempt "must be determined *in each individual case* based upon whether he *devotes his life* in the furtherance of the beliefs of Jehovah's witnesses, whether he *performs functions which are normally performed* by regular or duly ordained ministers of other religions, and finally, *whether he is regarded by other* [of] *Jehovah's witnesses in the same manner in which regular or duly ordained ministers of other religions are ordinarily regarded.*" (Emphasis added) (Sunal's Exhibit C; Kulick's Exhibit 2 and TR 164-169) [60] *

* The Court can judicially notice the administrative opinions and interpretations of the Act and Regulations. Bowles v. United States, 319 U. S. 33, 35.

That statement of advice by National Headquarters likewise is contradicted by the draft boards in construing the Act and Regulations in these cases.

Much emphasis is placed by the draft boards upon the absence of prisoners' names from the certified official list of Jehovah's witnesses forwarded to State Headquarters by National Headquarters of Selective Service System. To begin with, the requirement made by the Selective Service System that the Society file a list of its full-time pioneer ministers with National Headquarters was arbitrary. No other religious organization was required to file a list of its full-time ministers.

The presence or absence of the name of these ministers of Jehovah's witnesses did not justify the local boards or appeal boards in denying prisoners' claims for exemption as ministers of religion under the Act. It was the duty of the draft boards to classify each according to the facts appearing in the files irrespective of the absence of his name from the list of ministers filed with the Selective Service System.

Shortly after the list was completed in June 1941 it was anticipated that names of other full-time ministers would be added to the list. The Selective Service System promulgated a policy allowing for the addition of names to the list upon application made by the Society supported by affidavits of persons familiar with the background and activity of the persons whose names were to be added.

The method of investigating each new individual application of a new full-time pioneer to be added to the list put a heavy burden upon the limited stenographic force and personnel of the section of National Headquarters having charge of the classification of Jehovah's witnesses. Moreover, objections were raised by some local boards that National Headquarters was encroaching upon the original jurisdiction of the local boards in matters of classification

by addition of a registrant's name to the list. Accordingly, on October 29, 1942, by State Director Advice No. 88, the Director of Selective Service changed the policy regarding the adding of names to the list, and discontinued the practice of placing new names thereon.

This Court can take judicial notice of the records of the Selective Service System showing the policy of that agency with respect to Jehovah's witnesses and the arrangements that the Watchtower Society was forced to comply with. The records of the system showed that such Society recognized and certified all of its ministers, including prisoners, whose names were not on that list, to be authentic, duly authorized representatives of it, and it recognized all of its ministers, including these prisoners, as ministers regardless of whether their names appeared on the list which was under the control of the Selective Service System.

When the local boards finally classified the prisoners, the policy had been changed and it was impossible to have their names added to the list. When prisoners were finally classified, the undisputed evidence showed that they were in full-time status as pioneer missionary evangelists with the Society. It was the duty of the boards to classify them according to their status at the time of their classification. The action of the draft boards and the argument of the Government is directly contrary to the decision of the Seventh Circuit Court of Appeals in *United States* ex rel. *Hull* v. *Stalter*, 151 F. 2d 633. In that case the court held that the absence of Hull's name from the list did not justify the arbitrary denial of the claim for exemption as a minister. The court pointed out that the list had been abandoned at the time he was classified and that the failure to have his name on the list was immaterial.

On November 2, 1942, Opinion No. 14 was amended so as no longer to require that a full-time pioneer missionary evangelist of Jehovah's witnesses have his name upon such certified official list. The opinion provided: "The status

of members of the Bethel Family and pioneers whose names do not appear upon such certified list shall be determined under the provisions of paragraph 5 of this Opinion." Paragraph 5 of the Opinion reads:

"5. The members of Jehovah's Witnesses, known by the various names of members of the Bethel Family, pioneers, regional servants, zone servants, company servants, sound servants, advertising servants, and back-call servants, devote their time and efforts in varying degrees to the dissemination of the tenets and beliefs of Jehovah's Witnesses. The deference paid to these individuals by other members of Jehovah's Witnesses also varies in a great degree. It is impossible to make a general determination with respect to these persons as to their relationship to Jehovah's Witnesses. Whether or not they stand in the same relationship as regular or duly ordained ministers in other religions must be determined in each individual case by the local board, based upon whether or not they devote their lives in the furtherance of the beliefs of Jehovah's Witnesses, whether or not they perform functions which are normally performed by regular or duly ordained ministers of other religions, and, finally, whether or not they are regarded by other Jehovah's Witnesses in the same manner in which regular or duly ordained ministers of other religions are ordinarily regarded." (TR 167-169)

The failure of one of Jehovah's witnesses to have his name to appear upon the official list circulated by the Director of Selective Service to all State Headquarters does not militate against his claim for exemption as a minister of religion. It is the duty of the draft boards to consider the facts as revealed by the registrant's file and to classify him according to the Act and Regulations. If it appears that one of Jehovah's witnesses is actually engaged in regularly preaching the gospel of God's kingdom under the direction of a recognized religious organization, the mere fact that his name does not appear on the certified official

list of pio. er ministers referred to in Opinion No. 14 or State Director Advice No. 213-B, does not authorize the boards to reject his claim for exemption as a minister of religion. This is the view taken by the Government in its brief filed in *Benesch* v. *Underwood* (CCA-6) 132 F. 2d 430. There the Government informed the court that "the inclusion of Benesch's name on the list of 'pioneers' maintained at National Headquarters would not, *ipso facto*, entitle him to classification as a minister; neither could it be made a prerequisite to such classification. The inclusion of a name on the list is, at the most, evidence which may be considered by the local board in classifying the registrant. If it were otherwise, the officials at National Headquarters would be usurping the function which Congress delegated solely to the local boards." (See Government brief, p. 15, n. 9 and pp. 17-18)

In a letter from General Hershey, Directo of Selective Service, dated July 7, 1943, concerning the certified official list, he said, among other things, "The official list of Jehovah's witnesses, is no more than information from National Headquarters as to those members, who within the limited concept of religious organization, are recognized by the Watchtower Bible and Tract Society as ministers."

While inclusion of the name on the list may be considered by the draft boards in classifying a registrant, the absence of or even removal of a person's name from the list is not made the conclusive and exclusive test. The list was established and is maintained as a convenience by the Selective Service System and the Watchtower Society in taking appeals and other administrative action. It was never considered by the System and the Society to exclude from consideration by boards the exemption claim of other persons whose names did not appear thereon.

It is plain that the right of Jehovah's witnesses to classification as ministers of religion under the Act and Regulations is not confined to those whose names appear upon

the certified official list circuited by National Headquarters to the various State Headquarters of the System. Indeed, Opinion No. 14 (now superseded by State Director Advice No. 213-B) extends to full-time ministers of Jehovah's witnesses like the prisoners here whose names do not appear on or have been removed from the official list.

A broad and liberal interpretation should be placed upon the Act by the Court. It should be held that Congress intended to extend the provisions of the exemption not only to the orthodox denominations but to the dissentient and unpopular groups as well. Certainly Congress did not intend to restrict the protecting shield of the exemption to any particular denomination or creed. Congress intended that ministers of all religious denominations and groups should share the benefit of the exemption, in the same way as did the authors of the Constitution intend to bring within the protecting shield of the First Amendment the ministers of unpopular and dissentient groups as well as those of the popular and more orthodox denominations. *Cantwell* v. *Connecticut*, 310 U. S. 296; *Murdock* v. *Pennsylvania*, 319 U. S. 105; *Martin* v. *Struthers*, 319 U. S. 141.

Uniformly the Supreme Court has held that a broad and liberal interpretation should be placed upon the provisions of the various statutes exempting from taxation the property of religious organizations. *Trinidad* v. *Sagrada Orden de Predicatores de la Provincial del Santisimo Rosdrio de Filipinas*, 263 U. S. 578; *Helvering* v. *Bliss*, 293 U. S. 144.*

Preaching activities of ministers of religion bear burdens that would ordinarily fall directly upon the govern-

* Trustees of Griswold College v. State, 46 Iowa 275; Watterson v. Halliday, 77 Ohio St. 150, 82 N. E. 962; Mattern v. Canevin, 213 Pa. 588, 63 A. 131; Congregational Society of Town of Poultney v. Ashley, 10 Vt. 241, 244. Cf. Sharraai Berocho v. New York, 60 N. Y. Super. Ct. 479, 18 N. Y. S. 792.

ment. Were it not for the eleemosynary work the general public would be required to establish welfare institutions and kindred agencies and services. Thus the government would be required to impose additional taxes and make a heavier demand upon the manpower of the nation. The Christian preaching of the gospel enjoins upon the people of good will an obligation to conduct themselves uprightly and to be obedient to all proper laws. The contribution to the government through the benefits received by the people from the preaching activity of ministers of religion cannot be equaled by the government were it to undertake such work. The charitable activities of ministers of the gospel "constitute not only the 'cheap defense of nations' but furnish a sure basis on which the fabric of civil society can rest, and without which it could not endure." *Trustees of First M. E. Church South* v. *Atlanta*, 76 Ga. 181, 192; *M. E. Church South* v. *Hinton*, 92 Tenn. 188, 190, 21 S. W. 321, 322; *People* v. *Barber*, 42 Hun (N.Y.) 27; *Comm'th* v. *Y.M.C.A.*, 116 Ky. 711, 76 S. W. 522.

These same arguments as grounds for exemption of the minister of religion from all training and service in the armed forces were duly considered by the House Committee on Military Affairs at hearings had upon the Burke-Wadsworth bill, H. R. 10132. (Hearing before the Committee on Military Affairs, House of Representatives, 76th Congress, 3rd Session, July 30, 1940, pp. 299-305, 628-630) When the bill was before Congress, for consideration before passage, members of Congress declared that the exemption was for the purpose of maintaining the institutions of religions during the war and to insure the performance of and to guarantee that the people would receive religious training and guidance during the war.

There is nothing in the terms of the Act indicating that the Congress intended to restrict the terms "regular minister of religion" or "ordained minister of religion". Indeed

the records of the deliberations of the Congress indicate that it was the intention of the lawmakers to give the same broad definition to such terms as have been given by the whole people of the nation since the days of the first settlers of the country. That construction is a broad and liberal one so as to avoid discrimination.

The "Senate Committee on military affairs worked out an amendment to the Burke-Wadsworth bill deferring the military training of certain groups, ministers and others. The amendment was not satisfactory to all the churches. On August 12 I submitted amendments which do have their approval. . . . In presenting this amendment to the Senate I assume that those persons charged with the administration of this Act will give to religion its proper place in a democratic form of government, and to this end will adopt such rules and regulations as will embody the accepted definitions of the terms 'regular or duly ordained ministers of religion' as those terms are meant within this amendment. . . . A regular minister of religion, as used in my amendment, should mean a person who as his customary vocation preaches and teaches the principles of a religion, of a church, a religious sect, or organization of which he is a member, without having been formally ordained as a minister of religion, and who is recognized by such church, sect, or organization as a regular minister." (Senator Johnson of Colorado, 86 Cong. Rec. 10293, 10294. Cf 86 Cong. Rec. 10095)

The greatest part of the discussions in the deliberations of the Congress during consideration of the Burke-Wadsworth Bill insofar as they pertained to ministers and students preparing for the ministry were devoted almost exclusively to students preparing for the ministry. There is no question that it was definitely intended that students preparing for the ministry were considered by some of the Senators who discussed the matter as exempt only when they were engaged full time in the study. In

other words it was intended that the student preparing for the ministry should be a full-time student. There was nothing in the Act to indicate that if he worked at odd jobs to maintain himself in his schooling he would be denied his claim for exemption. The only requirement was that he be a full-time student and no more was demanded. Senator Walsh said, in his discussions of the provision for the exemption of ministers, that "ministers of the gospel and actual students who are engaged in giving all their time in preparation for religious work should be exempted." (86 Cong. Rec. 10502) Mr. Connally asked: "The bill exempts all ministers actively engaged in their duties. Is that correct? Mr. Walsh: Yes." (86 Cong. Rec. 10505)

It seems to be the emphatic opinion of at least one Senator that it was not necessary that a minister of the gospel should have attended a divinity school as a condition precedent to becoming a minister of the gospel. Mr. Connally said: "Mr. President, when I was a boy none of the preachers whom I ever heard preach could have taken the benefit of that exemption [students preparing for the ministry]. Many good old cornfield preachers who gathered their flocks around an open Bible on Sunday morning or gathered their flocks in camp meeting in the summertime, and got more converts during those two weeks than they got all the year, because next year they would get all those converts over again and then some new ones, never saw a divinity school. They never were in a seminary; but they walked with their God out yonder amidst the forests and plains; they read His book at night by kerosene lamp or fallow candle." (86 Cong. Rec. 10589-10590)

It was said that the provisions for exemption of ministers in the Burke-Wadsworth Bill was the same as the provision which appeared in the 1917 Act. (86 Cong. Rec. 10293) The provisions of the 1917 Act while being considered by the members of the Congress were held to extend to regular ministers as well as the ordained clergy.

It was provided that regular ministers, those not ordained as the clergy, should receive the same treatment as the ordained clergy received. (55 Cong. Rec. 1527, 1528) It was said that a regular minister "would mean a man whose calling is the preaching of the gospel and who follows that calling for a life work." (55 Cong. Rec. 1528)

The history of the discussions in the Congress shows no intention to limit the interpretation of the term in the manner as the Government would have it limited. Indeed Senator McKellar considered that a lay preacher was exempted under the 1919 Act. He said: "I think it will be conceded by all the record of Sgt. Alvin York overtopped and overreached the record of any other plain soldier who went into the American Army. Sergeant York was a lay minister. At the time the draft was put into operation he was urged by his friends, he was urged by his own conscience, by his own belief in peace, and by his own horror of war to ask for an exemption from the army because he was a minister of a church. After careful consideration, he concluded not to ask for exemption, . . ."

The Director of Selective Service has said that in Congress there was "a natural repugnance toward any proposals for drafting ministers of religion for training and service." *Selective Service in Wartime*, Second Report of Director of Selective Service 1941-42, p. 239.

In speaking of this exemption in *United States ex rel. Trainin* v. *Cain* (CCA-2, 1944) 144 F. 2d 944, it was said that ministers were exempted in order to prevent "disruption of public worship and religious solace to the people at large which would be caused by their induction."

In order to give the Act and Regulations the broad interpretation contended for here, it is not necessary for the court to strain the language of the Act and Regulations. Indeed, all that has to be done is to put a reasonable interpretation upon the language of the Act and Regulations in the light of history.

The Act provides: "Regular or duly ordained ministers of religion and students who are preparing for the ministry . . . shall be exempt from training and service (but not from registration) under this Act." (Selective Training and Service Act, 54 Stat. 887, 50 U. S. C. App. § 305 (d))

The Regulations define a *regular minister of religion* to be "a man who customarily preaches and teaches the principles of religion of a recognized church, religious sect, or religious organization of which he is a member, without having been formally ordained as a minister of religion; and who is recognized by such church, sect, or organization as a minister." (Reg. 622.44 (b))

"A 'duly ordained minister of religion' is a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect, or religious organization, to teach and preach its doctrines and to administer its rites and ceremonies in public worship; and who customarily performs those duties." (Reg. 622.44 (c))

These definitions do not say that the minister must be a member of an orthodox denomination. They do not exclude any member of any dissentient organization.

It is quite apparent that the Congress, in enacting the Selective Training and Service Act of 1940, did not intend to discriminate. It intended that the provisions of the exemption provision for ministers of religion should extend to all ministers of all denominations. There can be no question that the Congress intended to put upon the terms "regular minister of religion" and "ordained minister of religion" the same broad and commonly accepted definition that has been placed upon the terms in common parlance and in history of the ministry of the gospel in this country. Congress did not intend to limit the beneficent provisions of the exemption in the Act to any particular class of clergy or ministers. They intended to be fair to all. Since the Congress did not limit or restrict the definitions of the terms it is proper to consider what the terms

have meant to the people in light of history and of other situations similar to that presented in these two cases.

The term "regular minister" is used in the Regulations. The term "regular minister" has been defined to be one who regularly teaches and preaches. It has been held that the fact that a minister of religion may be performing secular work during the week to support himself and rendering his ministerial services gratuitously did not prevent him from being a regular minister of religion, because he preached regularly each week, and was therefore a regular minister of religion. *Ex parte Cain*, 39 Ala. 440-441.

It is to be observed that the Regulations use the word "customarily". *Customary*, the word from which it is derived; is synonymous to "usual" and "habitual". It does not mean *continuously*. It is not synonymous to *continuously, uninterruptedly, daily, hourly,* or *momentarily*. The Century Dictionary defines "customarily" to mean "in a customary manner; commonly; habitually". Therefore the use of the words "regular" and "customarily" implies that Congress intended to give the term "minister of religion" the same broad scope which it has included throughout the history of freedom of worship in this country.

From time immemorial the work of a preacher or minister has not been confined to speaking from a pulpit to a congregation that is capable of supporting the minister financially so as to make it unnecessary for him to depend on other sources for support and maintenance. In fact, ministers more often than not, especially in the rural sections, have been forced to work on farms, in grocery stores, and at other secular work during six days of the week in order to support themselves and their families, so that they might regularly and customarily preach on Sunday. It is a part of the custom of this country that preaching is done regularly when done on Sunday. As long as a minister preaches regularly on Sunday and at night times during the week he is regularly and customarily preaching.

If he regularly and customarily preaches during the week, he is a regular minister of religion under the Act and Regulations. The source of his income is wholly immaterial. Whether his congregation is able to provide him with an income sufficient to maintain himself is immaterial. Whether he is fortunate in being rich and able to maintain himself from stocks, bonds, securities and property investments is not material. Whether the regular minister, like most ministers, is not financially independent, but has to depend on his labors for his support is also immaterial. Time spent in attending to investments from which an income is derived, or to labor in secular callings, is also immaterial in determining whether or not the minister regularly and customarily teaches and preaches.

When the pioneers came to this country and settled it the ministers came along with them, working during the week and preaching regularly on Sunday. When the early settlers pushed into the midwest and the west and pioneered through to the Pacific coast ministers of religion went along, accompanying them, working in the woods and fields and following various secular occupations on six days of each week and regularly and customarily preaching on Sundays. Indeed, even today, in the small towns throughout the nation and in the rural areas are to be found thousands upon thousands of ministers of various religious denominations who work at secular work during the week to support themselves and who on Sunday regularly and customarily preach as do clergymen of the more wealthy congregations in the cities. True, there are scores of thousands of more ministers in the towns and cities, especially the large cities, who have been called by congregations sufficiently large and wealthy to provide them with an income that relieves them of the need to labor during the week. Surely Congress did not mean to say, when it wrote the exemption into the Act, that it was only for clergymen of wealthy congregations able to support their respective ministers so that they

would not be required to work at any secular avocation.

It should be remembered that Christ Jesus' apostle Paul, the foremost spokesman of the early Christian church, worked regularly at making tents. He chose to support himself by secular work rather than to be a charge and burden upon the poor people to whom he ministered publicly and from house to house.*

To construe the Act and Regulations so as to *exclude* ministers who are forced, or who, as Paul deliberately choose, to resort to secular work to sustain themselves in the ministry and thus to enable themselves to minister gratuitously to the poor and needy and themselves "be dependent on nobody", is to impute to Congress the intention of limiting the benefit of the exemption to the big-town and city ministers. So to construe the Act results in the inequality which Congress ever seeks to avoid. So to construe brings only the un-American result of excluding from 'equal protection of the law' those ministers of small towns and rural communities of the country who are either unable or unwilling to enjoy wealth that enables big-town

* "Paul departed . . . to Corinth; and found a certain Jew named Aquila, . . . with his wife Priscilla . . . and came unto them. And because he was of the same craft, he abode with them, and wrought: for by their occupation they were tentmakers. And he reasoned in the synagogue every sabbath, and persuaded the Jews and the Greeks." (Acts 18:1-4) "Paul . . . sent to Ephesus, and called the elders of the church. And when they were come to him, he said unto them, Ye know . . . how I kept back nothing that was profitable unto you, but have . . . taught you publickly, and from house to house." (Acts 20:16-20) "But we exhort you, brethren, . . . to work with your hands . . . and *be dependent on nobody.*" (1 Thessalonians 4:10-12, *Revised Standard Version* (New York, 1946, Thomas Nelson & Sons); compare Ephesians 4:28, *R.S.V.*) "For you yourselves know how *you ought to imitate us;* we were not idle when we were with you, we did not eat anyone's bread without paying, but *with toil and labor we worked night and day,* that we might not burden any of you. It was not because we have not that right, but *to give you in our conduct an example to imitate.* . . . For we hear that some of you are living in idleness, mere busybodies, not doing any work. Now such persons we command and exhort in the Lord Jesus Christ to do their work in quietness and to *earn their own living.* . . . I, Paul, write this greeting with my own hand." (Emphasis added) 2 Thessalonians 3:7-17, *R.S.V.*

and city ministers to escape the need to labor to support themselves and their dependents. Surely Congress intended to provide the benefits of exemption for ministers of rural and small-town parishes as well as for ministers who chose to answer the call of opulent congregations in 'Big Town' and metropolis. Seen in true perspective, the Act's generous provision for exemption of ministers within the Congressional intent contrasts strikingly with the deficient and inequitable definition of the scope of that provision the habeas corpus courts undertook to carve out of the law in the instant cases.

In absence of express provision in the Act and Regulations excluding from the shield of the exemption ministers regularly or customarily preaching who support themselves by their own labor at secular jobs, it must be assumed that Congress intended to include those as well as the minister able to enjoy benefits of his parishioners' wealth so as to excuse him from need to toil for his own livelihood during the week.*

At present there are a large number of clergymen and ministers of Protestant and Jewish denominations who depend for their support upon secular work. In the Northern Baptist Convention 20 percent of all clergymen in rural sections "help earn their keep by work not connected with their churches." (Hartshorne and Froyd, *Theological Education in the Northern Baptist Convention* (1945) Judson Press, Philadelphia, p. 72) In the Southern Baptist Convention the percentage is much higher.

Twenty-four percent of all Protestant clergymen in the United States in 1939 received less than $600 annual salary from their respective churches, of which 14 percent received less than $99 annually. "There is nothing to indi-

* Even the National Headquarters of the Selective Service System recognizes that ministers of many denominations are required to perform secular work in order to sustain themselves while engaged in the ministry. State Director Advice 213-B, Part III, ¶ 3. (Sunal's Exhibition C)

cate that those in the lower brackets also had other occupations, although it is a safe guess that many of them did." (Landis, *Yearbook of American Churches* 1945, Federal Council of Churches of Christ in America, Sowers Printing Co., Lebanon, Pa., p. 155; see also United States Bureau of Census, Series P-16, No. 8, 16th Census.)

It is well known that the majority of the ministers of the Society of Friends (Quakers), Church of Jesus Christ of Latter-day Saints (Mormons), Mennonites, and many others are dependent entirely upon secular work for their support, no salary being paid to their ministers as a general rule.*

It is to be observed that each prisoner actually devoted 150 hours monthly to preaching and the duties of his ministry, which is more time than is devoted by the clergymen who have congregations wealthy enough to support them without performance of secular work. The orthodox church-sustained clergy do not spend near as much time in their preaching activities, yet they do not sustain themselves by secular work as do the prisoners.

Throughout history of religious organizations "ministers of religion" have been distinguished from "church-sustained clergy". Even the self-supporting ministers contributed more than the clergy to the spread of religion amidst the pioneers in the days of expansion to the West.

"This society [Watch Tower Bible and Tract Society] publishes a semi-monthly journal, called 'Zion's Watch Tower and Herald of Christ's Presence;' . . . quantities of free literature, printed in many languages, are circulated continually. Any or all, who can give any or all of their time to the Lord's work, are His ministers, ordained of

* "'I am the only person in the church,' [Brigham] Young said to Greeley in 1859, 'who has not a regular calling apart from the church service'; and he added, 'We think a man who cannot make his living aside from the ministry of the church unsuited to that office.'" Linn, *The Story of the Mormons* (1902, The Macmillan Co.) p. 576.

Him alone,—no other conditions being necessary." Besse, *Church History* (1908, Holzapfel Pub'g Co., Cleona, Pa.) pp. 256-260.

". . . about the anniversary meetings, . . . a brief, summary view. . . . About two hundred of God's ministers were in attendance, all told—for *all* are ministers, servants of the truth, from our standpoint and from the standpoint of God's word; in which all are recognized as *priests*—of the royal priesthood . . . The general sentiment . . . was, that they would be all the more diligent hereafter to pass the pleasant bread of truth to the hungering sheep of the Lord." *Watch Tower* (Watch Tower Bible and Tract Society, then Allegheny, Pa., now New York), April 1890, Vol. XI, No. 5, p. 1.

"The church has always been more successful in winning kingdoms for her Christ, when she has adopted just this lay preaching method. . . . The whole church a royal priesthood, and so the whole church a preaching church, that is the New Testament ideal." *Lay Preaching* (Secretary's Annual Report), Hoyt, American Baptist Publication Society, 1869, New York, p. 21.

The only way the preaching job could be successfully done in the pioneer days was said to be "by the preaching and teaching, under Episcopal direction, by laymen deriving their support from their own secular labors." *The Missouri Valley and Lay Preaching*, Wharton, 1859, New York, p. 18.

"Although made the special work of certain representative disciples, it is, in fact, enjoined upon the Church as a whole, and upon its members in particular, 'as of the ability which God giveth' (1 Pet. 4: 10, 11) . . . From these scriptural examples, it is just to infer that lay preaching, in the various forms of teaching, evangelizing, and prophesying, had from the first a double object: 1, to do good to all men; and, 2, to develop and prove the gifts of those who from time to time were called from the ranks of the laity to the more public ministry of the Word. Such, doubt-

less, continued to be the practice of the Church during the early centuries, and it was only by degrees that it became modified under the hierarchical spirit which became developed at a later period. . . . In the Reformed churches there was a general breaking away from the trammels of ecclesiasticism, together with an energy of purpose which did not scruple to employ any agencies at its command for the dissemination of truth. . . . The first formal and greatly effective organization of lay preaching as a system, and as a recognized branch of Church effort, took place under John Wesley at an early period of that great religious movement known as the revival of the 18th century." *Cyclopedia of Biblical, Theological, and Ecclesiastical Literature*, McClintock and Strong, New York, Harper & Bros., 1880, Vol. 5, pp. 296, 297.

The English Court of Appeals held that the conscription law of that country, passed during the first world war, should be given an interpretation so as to include a part-time minister of unorthodox Strict Baptist Church. (*Offord v. Hiscock*, 86 L. J. K. B. 941) In that case the person held to be a minister was a solicitor's clerk during six days of the week. He was invited to preach on one occasion and it appeared that he was satisfactory, so he was engaged as the minister. In that case Viscount Reading said: "I have come to the conclusion that there is an absence of any evidence from which the justices could draw the conclusion that he had not brought himself within the exception to the statute enforcing military service. In my view it is clear that he had determined to devote himself to the ministry."

Under the Canadian National Selective Service Mobilization Regulations the Supreme Court of Saskatchewan held that a registrant was entitled to exemption from all training and service as a minister of religion. (*Bien v. Cooke*, 1944, 1 W.W.R. 237) There the minister spent six days a week farming. No special educational requirements were necessary. All that was required was that he satisfy

the general secretary, who was a railroad engineer, that he believed the New Testament, and that he met the necessary moral requirements.

United States ex rel. Trainin v. *Cain* (CCA-2) 144 F. 2d 944, held that the regular performance of secular employment was not incompatible with the claim for exemption as a regular minister of religion: "While the two positions are not mutually exclusive, and a validly draft-exempt minister of religion could still maintain a legal practice on the side, the existence of the latter can be taken into consideration in determining whether registrant is in fact a regularly practicing minister."

The holding and results reached in the *Trainin* case are not apposite here. However, the principles laid down in the opinion in that case can aid this Court to find that the prisoners here are regular ministers of religion. It should be observed that in the *Trainin* case the Second Circuit Court found that the registrant did not regularly perform his functions as a rabbi. Moreover, the court found in the draft-board record in that case that Trainin never pressed his claim very strongly. Also the court found that his testimony and proof concerning the regular performance of his functions as a rabbi were thoroughly discredited. No such circumstances exist in the instant cases. Here the prisoners were not discredited in their testimony. No doubt arose that they performed regularly their duties as ministers of religion. No question was raised as to their good faith. No evidence was offered that they did not perform their duties as ministers of religion.

Even assuming, for the purpose of argument only, that the prisoners are not, in the opinion of the Court, regular ministers of religion within the meaning of the Act and Regulations, they are, nevertheless, ordained ministers of religion.* Under the circumstances that the prisoners are

* Selective Training and Service Act, § 5 (g); Selective Service Regulations, § 622.44.

ordained and regularly performed their duties as ordained ministers, "a more difficult question" is presented. *United States ex rel. Traisin* v. *Cain*, 144 F. 2d 944.

Since neither the Act nor the Regulations exclude dissentient groups, they cannot be construed by the court to exclude unorthodox ministers. It must be assumed that the Act and Regulations were intended to embrace within the exemption the ministers of all denominations, whether popular or unpopular, orthodox or unorthodox, whether conformist or dissident. Any other view would require us to impute to Congress the intention of discriminating between religious denominations and ministers according to nebulous or arbitrary standards, with resultant inequitable, crochety application of the statute as attempted by the district courts in these cases.

A realistic approach to the application of the Act here providing for benefits to religious organizations requires that the Court make "no distinction between one religion and another. . . . Neither does the court, in this respect, make any distinction between one sect and another." (Sir John Romilly in *Thornton* v. *Howe*, 31 Beavin 14) The theory of treating all religious organizations on the same basis before the law is well stated in *Watson* v. *Jones*, 80 U. S. (13 Wall.) 679, 728, thus: "The full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." It must be assumed that Congress, when it provided in Section 5 (d) of the Act for ministers of religion to be exempt from all training and service, intended to adopt the generous policy above expressed so as to extend exemption to all ministers of all religious organizations.

It has been judicially declared that were "the administration of the great variety of religious charities with which our country so happily abounds, to depend upon the opinion of the judges, who from time to time succeed each other in the administration of justice, upon the question whether the doctrines intended to be upheld and inculcated by such charities, were consonant to the doctrines of the Bible; we should be entirely at sea, without helm or compass, in this land of unlimited religious toleration." (*Kniskern* v. *Lutheran Churches*, 1 Sandf. Ch. 439, 507 (N.Y.)) All religions, however orthodox or heterodox, Christian or pagan, Protestant or Catholic, stand equal before the law which regards "the pagan and the Mormon, the Brahmin and the Jew, the Swedenborgian and the Buddhist, the Catholic and the Quakers as all possessing equal rights." (*Donahue* v. *Richards*, 38 Me. 379, 409. Cf. *People* v. *Board of Education*, 245 Ill. 334, 349; *Grimes* v. *Harmon*, 35 Ind. 198, 211) Protection is therefore afforded not only "to the different denominations of the Christian religion, but is due to every religious body, organization or society whose members are accustomed to come together for the purpose of worshiping the Supreme Being." (*State ex rel. Freeman* v. *Scheve*, 65 Neb. 853, 879) It is now clear that the American legislative, executive and judicial policy concerning religious organizations, beliefs and practices is one of masterly inactivity, of hands off, of fair play and no favors. (*People* v. *Steele*, 2 Bar. 397) "So far as religion is concerned the laissez faire theory of government has been given the widest possible scope." (*State ex rel. Freeman* v. *Scheve*, 65 Neb. 853, 878, 93 N. W. 169)

Neither Shakers nor Universalists will be discriminated against in distributing the avails of land granted by Congress in 1778 for "religious purposes." (*State* v. *Trustees of Township*, 2 Ohio 108; *State* v. *Trustees*, Wright 560 (Ohio)) Whatever the personal views of a judge may be concerning the principles and ceremonies of the Shaker

society, whether to his mind their practices smack of fanaticism or not, he has no right to act upon such individual opinion in administering justice. (*People* v. *Pillow*, 3 N.Y. Super. Ct. (1 Sandf.) 672, 678; *Lawrence* v. *Fletcher*, 49 Mass. 153; *Gass* v. *Wilhite*, 32 Ky. (2 Dana) 170) In the field of religious charities and uses the doctrine of superstitious uses was eliminated from American jurisprudence as opposed to the spirit of democratic institutions because it gave preference to certain religions and discriminated against others. It was held that the doctrine was contrary to "the spirit of religious toleration which has always prevailed in this country" and could never gain a foothold here so long as the courts were forbidden to decide that any particular religion is the true religion. (*Harrison* v. *Brophy*, 59 Kans. 1, 5, 51 P. 885; cf. *Methodist Church* v. *Remington*, 1 Watts 219, 225; 26 Am. Dec. 61 (Pa.); *Andrew* v. *New York Bible and Prayer Book Society*, 6 N.Y. Super. Ct. (4 Sandf.) 156, 181) Thus in the field of various religions as long as a particular method of preaching does not conflict with the law of the rights of others no matter how exotic or curious it may be in the opinion of others it is fully protected by the law. (*Waite* v. *Merrill*, 4 Me. (Greenl.) 102, 16 Am. Dec. 238, 245)

"History teaches us that there have been but few infringements of personal liberty by the state which have not been justified, as they are here, in the name of righteousness and the public good, and few which have not been directed, as they are now, at politically helpless minorities." *Minersville* v. *Gobitis*, 310 U.S. 586, 604.

In the case of *Ex parte Cain*, 39 Ala. 440, in determining whether or not the part-time minister attempted to be drafted under the conscription act of the Confederacy during the Civil War was entitled to exemption, the Alabama Supreme Court aptly states the limitation of the judiciary in passing upon matters spiritual in so far as they pertain to the activity of a minister claiming exemp-

tion, saying: "Neither this court, nor any other authority judicial or executive, in this government, is a hierarchy clothed with the power of determining the orthodoxy o any religious sect or denomination. It does not vary th question, in the present case, that Mr. Cain belonged t a sect of religionists, who perform ministerial labor gra tuitously."

In the decision styled *In re Reinhart* (9 Ohio Dec. 44 445) the court said: "The moment an attempt is made t limit or restrict ordination to some special form of cere mony, we begin to discriminate between the diverse mode and forms of ordination practiced by the various religiou societies. The laws of Ohio make no discrimination in an respect between Catholic or Protestant, Greek, Gentile Jewish, or any other religious societies or denominations much less do they attempt to prescribe any mode or form of ministerial ordination, which is defined in the Standard Dictionary as 'the act or rite of admitting and setting apart to the Christian ministry or to holy orders, especially i the Roman Catholic, Anglican and Greek churches; conse cration to the ministry by the laying on of hands of a bisho or bishops; in other churches, consecration by a presbytery synod, or council of ministers.'"

The intent to give the Regulations a broad, liberal inter pretation as to what constitutes a minister of religion i proved in the fact that the terms of the Act and Regulation have been extended to include within the exemption pro vision "Lay Brothers" of the Holy Roman Catholic Church (State Director Advice 213-B, Part IV, subd. 2) (Sunal's Ex hibit C) It should be observed that the "Lay Brothers" are not, in the strict sacerdotal sense, ministers of religion, a declared by the Director of Selective Service, who concern ing the broad interpretation to be placed upon the Act said "Freedom to worship is one of the four freedoms for which we fight. Even in days before we realized that our civili zation was to be challenged, even to its religious roots, i

was felt that regular and duly ordained ministers should be exempted from military duty. . . . The principle was extended to persons who were not, in any strict sense, ministers or priests in any sacerdotal sense. It included Christian Brothers, who are religious, who live in communities apart from the world and devote themselves exclusively to religious teaching: Lutheran lay teachers, who also dedicate themselves to teaching, including religion; to the Jehovah's witnesses, who sell their religious books, and thus extend the Word. It includes *lay brothers* in Catholic religious orders, and many other groups who dedicate their lives to the spread of their religion." * (Emphasis added)

"Lay Brothers" of the Holy Roman Catholic Church are not priests, nor in line for the priesthood, of the Roman Catholic Hierarchy. "We may distinguish two types of Brothers; viz.: those who directly serve the people at large, for example by teaching, and those who do so indirectly, namely, by directly serving priests or other religious who in turn serve the people directly. . . . . Let us consider the offices performed by the second group a little more closely. These men do the manual work necessary in religious communities and institutions. Their ministrations, given freely, are absolutely necessary, if the priests are to be free to attend to their special work. Hence, the arguments which prove the need of clergy prove likewise the need of these . . . very important members of religious communities. They also ought, therefore, to be exempted." ** Menial work and

* *Selective Service in Wartime*, Second Report of the Director of Selective Service, 1941-42 (Government Printing Office, Washington) pages 239-241.

** Kennedy (Congressman Martin J.) letter to House Military Affairs Committee, August 7, 1940, *Hearings*, etc., 76th Cong., 3d Sess., on H.R. 10132, pp. 628-630.

"*Lay Brothers*—Religious [persons] occupied with the secular affairs of a monastery, such as taking care of the sacristy, buildings, farms, household, and visitors. Very often they are artists and craftsmen." *National Catholic Almanac* 1945 (compiled by the Franciscan Clerics of Holy Name College, Washington, D. C., and published with Ecclesiastical

entire absence of the doing by them of any strictly ecclesiastical duties constitute the whole functional status of one very important of two types of "Lay Brothers". They do not conduct religious services of any kind and many are declared to be uneducated and "unable to attain the degree of learning requisite for Holy orders" but "able to contribute by their toil" and "able to perform domestic services or to follow agricultural pursuits".*

There is no question that the administrative interpretation of the Act and the Regulations have been broad, to every group except Jehovah's witnesses, who have been recognized as a religious organization standing on the same level with other organizations under the act.

In the general instructions concerning ministers of religion issued by the National Headquarters of the Selective Service System it is stated that the "historic nature of the ministerial function of a registrant's own religious organization must be taken into consideration in each individual case." (State Director Advice Number 213-B, Part III, Par. 3, Issued June 7, 1944.) ** In the case of Jehovah's

Approbation by Saint Anthony's Guild, Paterson, N. J.), page 231. Compare carefully *Lay Brothers* definition of December 14, 1940, "*officially certified* to National Headquarters" of Selective Service System by Archbishop (now Cardinal) Mooney. (Sunal's Exhibit C, State Director Advice 213 B) See also OPINION No. 2, National Headq'rs, Selective Service System, Jan. 25, 1941.

* *The Catholic Encyclopedia* (1907, Robert Appleton & Co., N. Y.) Vol. 9, p. 93. "Lay Brothers" who do not preach from the pulpit, and who do not minister the sacraments or otherwise function as do the ordained Catholic clergy, number at present, in the United States, more than 10,000. (Official Catholic Directory 1946, New York, P. J. Kenedy & Sons) That, it is to be observed, is more than twice the entire number of some 4,000 of Jehovah's witnesses who have been illegally classified and committed to prison under the Act because certain draft boards *wrongly* did not regard them as having, under the law, a standing equivalent to that of Roman Catholic priests and the clergymen of other popular orthodox denominations.

** Amended September 25, 1944. It incorporates the provisions of Opinion No. 14 of Volume III of National Headquarters Selective Service System Opinions concerning Jehovah's witnesses dated June 14, 1941.

witnesses the historic nature of their missionary evangelistic society whereby every one must be a duly trained and equipped minister of religion regularly engaged in preaching as a missionary evangelist was almost uniformly ignored. The historic nature of the ministerial functions of other religious organizations was imposed in many cases so as to exclude Jehovah's witnesses from their claim for exemption.

The Director provided for the benefit of all religious organizations except Jehovah's witnesses the wise and generous provision that in "some religious organizations both practice and necessity require the minister to support himself, either partially or wholly, by secular work." (*Ibid.*) In the case of Jehovah's witnesses it was directed that the eligibility of one of Jehovah's witnesses depended on whether "he devotes his life in the furtherance of the beliefs of Jehovah's witnesses". (*Ibid.*, Part IV, Paragraph 3) This was generally construed so as to deny Jehovah's witnesses engaged regularly in preaching the gospel as missionaries each week who supported "himself; either partially or wholly, by secular work."

The boards were instructed that in "view of the fact that the exemption of regular or duly ordained ministers of religion is a statutory provision of the Act, no particular form of document is specified for the presentation of information concerning such status." (*Ibid.*, Part III, Paragraph 4) Yet in the case of Jehovah's witnesses the boards were implicitly instructed to disregard the written proof submitted by Jehovah's witnesses in the following language: "Information presented in the case of a registrant who claims to be a minister of the Jehovah's witnesses group must show fact regarding both his ministerial position and his ministerial activities which clearly justify his exemption as a minister. Certificates, affidavits, or statements of opinion are not necessarily conclusive proof of a ministerial status." (*Ibid.*, Part IV, Paragraph 4)

The Seventh-Day Adventist Church colporteurs who are engaged in mere distribution of books from place to place and door to door were declared to be exempt. It is said: "Members of this church consider their colporteur evangelistic work to be of highest importance in the propagation of the faith. They look upon the men who do this work as engaged in a vocation comparable to the gospel ministry, even though they are not ordained. When a registrant is found to be actually engaged in a bona fide manner in full-time work of this nature and files evidence of possession of a colporteur's license or colporteur's credentials, he may be considered a regular minister of religion." (*Ibid.*, Part IV, Paragraph 10)

In the case of Jehovah's witnesses it was required that they file a list of their full-time missionary evangelists known as pioneers. This list was frozen in 1942 and no names could be added to it. It was only the full-time missionary evangelists whose names were on this list that the National Headquarters declared to be entitled to consideration as ministers of religion. (*Ibid.*, Part IV, Paragraph 3) All bona fide full-time pioneer Jehovah's witnesses whose names did not appear on the list certified to by National Headquarters of the Selective Service System were eligible for consideration as ministers of religion only if they could establish, in addition to devoting their full time to the ministry, that (1) they performed functions normally performed by ministers of orthodox religion, and (2) they show that they were regarded by other Jehovah's witnesses as standing towards them as do the clergy of the orthodox religions. (*Ibid.*, Part IV, Paragraph 3)

These two requirements (demanded of bona fide full-time pioneer missionary evangelists of Jehovah's witnesses coming clearly within the definition of ministers of religion as the term is used in the Act and the Regulations) denied them classification as ministers of religion and exemption because they could not establish that they came up to the

standards of the orthodox clergy. This requirement was not made of the Seventh-Day Adventists or any other missionary evangelistic group or society of ministers. It discriminated against Jehovah's witnesses and imposed the orthodox religious standards of other religions upon full-time missionary evangelists. As a result they were excluded from the exemption terms of the Act and Regulations under which they clearly came.

The administrative interpretation of the position of Jehovah's witnesses under the Act and Regulations as announced by the National Headquarters of the Selective Service System has been declared by the court below in the Kulick case to be extremely narrow. In that case it was said:

"Furthermore, Kulick apparently persuaded the board at the August hearing that he regularly preached five hours a day; and there was strong reason for saying that that made him a "regular minister" within the extremely latitudinarian interpretation which 'Opinion No. 14' put upon the term, 'regular minister,' when applied to Jehovah's witnesses."

In another case the United States Circuit Court of Appeals for the Second Circuit has declared that the consideration of the claim of Jehovah's witnesses according to the orthodox standards was in effect like applying the standards of the Sanhedrin, the scribes and Pharisees, to determine whether Christ Jesus and his apostles were ministers of religion. The application of the standards of one religious organization to determine the rights of another under the Act was condemned. This decision was in the case of *United States* v. *Balogh*, 157 F. 2d 939. In that decision the court said, *inter alia*:

"Jehovah's witnesses appear to be a sect of a kind by no means uncommon in religious history, which relies for the inspiration of preachers and members alike upon the Inner Light of immediate personal conviction, ineffable but

nonetheless imperative, which invades its possessor's being with an irrefragable authority. . . . Yet it would be a misapprehension to exclude such sects from the purpose of Congress, to which we are to impute, not only a tolerance of, but a positive concern for, the preservation of all creeds that can be found grouped within the widely comprehensive term, 'religion.' . . .

"Be that as it may, the report shows that the 'Panel' completely misunderstood its functions, if it had any proper functions whatever in such a case, which it did not have, as we shall show. It rested its conclusion upon an interpretation of the statute that Congress did not mean to exempt the ministers of any sect in which laity and ministry or clergy were not separate; a question on which the board had no right to receive advice anyway, and, in addition, one to which the 'Panel' gave the wrong answer. . . . Besides, there was not the slightest excuse for sending the case to a 'Panel' so constituted. As we have said, the record does not tell us, except for the names, who were the three gentlemen who made it up; but, even though they were Protestant ministers, they could have no proper part in an inquiry involving Jehovah's witnesses. . . . But they were put in a position where their specialized knowledge, whatever that may have been, could not be used, as indeed appears from the fact that all they did—or could do—was to lay down instructions to the board, based upon their construction of the intent of Congress, as to which they were not an iota better qualified than the board itself. . . . So in the case at bar 'Headquarters' might have referred the case to a panel, especially acquainted with the practices of Jehovah's witnesses, for an opinion whether in accordance with these, Balogh would be recognized as a 'regular minister'. But the actual 'Panel' had no such competence, and did not assume to have; it did all it could do; it construed the statute. Finally, it was to the last degree ingenuous to expect any light from such a panel, which, to act

at all, had first to divest itself of those ingrained habits of mind inevitable in any calling; and to bring a completely detached judgment to a heterodox creed. That is not an impossibility, indeed, perhaps the 'Panel' in this case succeeded in mastering the handicap; but handicap it was, and a handicap from which the board itself was free, save as the report may have influenced it. Such a panel could not contribute, and was improperly interjected into the proceedings."

Although the propriety of applying the standards of one religion to that of another in determining rights under the Act has not been condemned yet by this Court, it has been declared to be an open question. In the case of *Eagles* v. *United States*, 67 S. Ct. 313, 318, it is said, among other things, that

"Distinct questions would be raised if a registrant of one faith were referred to a theological panel on which his faith was not represented. See *United States* v. *Balogh*, 2 Cir., 157 F. 2d 939. But it has not been shown that such a condition obtained here."

While the narrow and orthodox requirements of the above administrative opinion has been generally considered by the local boards for what it says, resulting in many inconsistent classifications, the National Headquarters in the administration of its Appeals Section, which is a division of the headquarters devoted to determining whether appeals shall be taken to the National Headquarters, has not actually confined the opinion to such narrow bounds. In determining whether an appeal should be taken to the President at the instance of the National Director the rigorous requirements have been considerably relaxed. In his letter of July 15, 1946, printed by the petitioner in the Kulick case as an exhibit to his brief, Major Wherry for the Director of Selective Service said, *inter alia*, that "whether an official of the Jehovah's witnesses is to be recognized as a regular or duly ordained minister must be

determined in each individual case based not only upon whether he is regarded by other Jehovah's witnesses as a minister of religion but also upon whether he performs functions which are those generally recognized as religious and ministerial functions normally performed by regular or duly ordained ministers of religion and the extent to which he devotes his life to the furtherance of your beliefs. . . .

"From this information we have gained the impression that many of your Company Servants and Servants to the Brethren hold positions of considerable religious leadership within the organization. We have felt that the demonstration of this leadership may qualify a man to be considered a minister of religion by Selective Service . . . This has been done without regard to the question of the registrant's having been engaged in certain secular employment.

"We mention this because it appears that you feel undue consideration has been given by Selective Service to the secular employment engaged in by certain Jehovah's witnesses. We emphasize the fact that in our opinion the controlling factor in the final analysis of any case wherein a man claims to be a minister is the question of his ministerial work and not that of his secular employment. However, information indicating that a man who claims to be a minister is engaged in secular employment may raise a question regarding the extent that secular employment crowds out and precludes ministerial activities. . . .

"Other members of Jehovah's witnesses may be judged also by either of these standards. However, it would appear that most of them must be judged on the basis of the extent to which they have devoted their lives to the work of your church. Regarding this we have set no standard number of hours in religious work as a standard, although you have stated to us that a 'Pioneer is required to devote a specified minimum of 150 hours per month to his ministerial duties.' You have also told us that 'there are also a number

of special pioneers. These are required to devote 175 hours per month to their work . . . . . .

"As we have stated hereinbefore, we have not accepted your specified number of hours of work for a Pioneer as a standard of work for a member of the minor clergy. But where one of your men fails in meeting that quota, for reasons other than sickness, we feel that no good reason exists for us to take action with a view of procuring a IV-D classification for the man. Accordingly, we informed you that no further action was contemplated in this case. . . .

"If the man demonstrates through his religious and ministerial work that he holds a position of leadership in your church and that his exemption 'is necessary to protect the church' or if the man demonstrates that he has consecrated his life to religious service, we feel that he is entitled to classification in Class IV-D and exemption from training and service."

There is not the slightest bit of doubt that even under this administrative interpretation of the Act and Regulations, relaxing a bit the more latitudinal definitions appearing in the State Director Advice, the prisoners, Kulick and Sunal, come within the definition of a minister of religion. The life of each is devoted to the ministry of Jehovah's witnesses. They are each able to devote the time required to fill the organizational quota for full-time missionary evangelists. The secular work that they performed did not crowd out and preclude their ministerial activities. Neither of them failed to meet the quota of their full-time pioneer requirements because of the part-time secular activity. Their course of action demonstrated that they had consecrated their lives to Christian service as ministers; therefore, under the interpretation of July 15, 1946, they should be "entitled to classification on Class IV-D and exemption from training and service." (Letter of July 15, 1946.)

The Government argues that in event the writ of habeas corpus is sustained in each of these cases there is every likelihood that the prisoners will be prosecuted again. The prisoners have every reason not to believe these statements made by the counsel for the wardens in these cases. The Government said that Gibson and Estep would be tried again in event this Court should discharge them. In each of the *Gibson* and *Estep* cases the Government told the Court that the accused was not a minister and that the draft board did not err. But, strange as it may seem in the face of these bold assertions to this Court upon the ministerial status of those men, when the cases were remanded to the district courts the Government directed that the indictments be dismissed. The prosecutions in both cases in which both men had been formerly convicted and sentenced to prison were dismissed. This is presumably because the Government reached the opinion that the draft board orders were invalid for each of the reasons contended for by the prisoners here.

Jehovah's witnesses make a distinction between "shepherd and flock". Jehovah's witnesses consider that they are the "shepherds" because they preach to and teach the people as ministers of Almighty God, JEHOVAH, under His appointed Good Shepherd, Christ Jesus. This they do from door to door and publicly, as did Christ Jesus, His apostles, the disciples, and the thousands of Christian ministers who were associated with them in the various congregations at Jerusalem, Antioch, Alexandria, Corinth, Rome, and elsewhere. The "flock" served by Jehovah's witnesses is to be found in the homes of the people, where Jehovah's witnesses conduct Bible studies, serving millions of persons annually.*

* See 1947 *Yearbook of Jehovah's witnesses* (New York, Watch Tower Bible and Tract Society), pp. 36, 46, 257. Compare Swaczyk v. United States (CCA-1) 156 F. 2d 17, cert. denied Oct. 14, 1946, 67 S. Ct. 77; Smith v. United States (CCA-4) 157 F. 2d 176, cert. denied Nov. 12, 1946, 67 S. Ct. 189, rehearing denied Dec. 16, 1946, 67 S. Ct. 367.

Moreover, there are 70,000,000 people in this country who do not belong to any church, as well as many other millions belonging to a church who do not attend. These millions need to be served by missionary evangelists. Jehovah's witnesses have answered the need by calling upon the people as missionaries from house to house.

In performing their missionary work, Jehovah's witnesses act as ministers, going to the congregation. They, unlike orthodox clergymen, do not require the congregation to come to them. Jehovah's witnesses act as servants to the people, as did the Lord Christ Jesus, who was a humble servant of the people of good will with whom He met in His door-to-door missionary work.*

Each one of Jehovah's witnesses must preach in order to be one of Jehovah's witnesses. One who does not preach is not one of Jehovah's witnesses. Jehovah's witnesses are a society of missionary evangelists, engaged in missionary preaching work of the highest type, at home as well as abroad, and throughout the whole world. It is not unusual to hear of a congress of ministers. The Jesuit organization (Society of Jesus) that functions in connection with the Roman Catholic Hierarchy is, for example, a society of ministers. Various foreign-missionary societies of the popular orthodox religious denominations are composed exclusively of ministers, ordained and unordained, who preach the religions of the respective denominations only in foreign countries from door to door and house to house in the same way as do Jehovah's witnesses in the United States and in all other countries. Therefore it is highly improper and inappropriate to compare a congregation of

* "Whether is greater, he that sitteth at meat, or he that serveth? is not he that sitteth at meat? but I am among you as he that serveth." —CHRIST JESUS, at Luke 22:27.

"Behold, I stand at the door, and knock: if any man hear my voice, and open the door, I will come in to him, and will sup with him, and he with me."—CHRIST JESUS, at Revelation 3:20.

Jehovah's witnesses with a congregation of Baptists or other Protestant laymen-religionists, or Jews, in the orthodox sense. Of course in those orthodox religious congregations of laymen only one or two persons minister (as recognized ministers) to the entire congregation. Such ministering consists of preaching done from a pulpit to the assembled laymen-congregants. Those preached to come to the preacher to hear him. The preacher does not go to the people at their homes as do Jehovah's witnesses. Members of congregations of orthodox clergymen do not preach as do Jehovah's witnesses. Such members or congregants are only preached to. Among Jehovah's witnesses each one of Jehovah's witnesses is a preacher and preaches regularly to hundreds, if not thousands, of others each year. Hence, to compare a congregation of laymen, served by an orthodox religious clergyman, to an assembly of missionary evangelists (Jehovah's witnesses), and by rule of thumb to say that such assembly of missionary evangelists is not a group of ministers simply because the congregation of laymen is not a group of ministers, is syllogistic and logistical legerdemain which discriminates and destroys entirely the intent of Congress in providing exemption for ministers of all denominations regardless of whether they were able to get a congregation to come to them or whether they had to go to the congregation; and regardless of whether they were wealthy enough to preach without choosing or being forced to resort to secular work to support themselves in their ministry.*

It is fitting to quote from the opinion in *United States* ex rel. *Hull* v. *Stalter* (CCA-7) 151 F. 2d 633, where, *inter alia*, the court said:

* For further reference to a more extensive argument showing why the invalidity of the boards' determinations in denying prisoners' claims for exemption as ministers of religion in these cases, see the printed brief filed by petitioners in Smith v. United States, No. 66, October Term 1945 and Estep v. United States, No. 292, October Term 1945, pp. 131-190.

"Much is said in the briefs both complimentary and derogatory to Jehovah's Witnesses. With this argument we are not concerned. Whatever a draft board or a court, or anybody else for that matter, may think of them is of little consequence. The fact is, they have been recognized by the Selective Service System as a religious organization and are entitled to the same treatment as the members of any other religious organization. . . . In our view, every registrant, whether he be Jehovah's Witness or otherwise, is entitled to have his status determined according to the facts of his individual case. Also, a registrant's classification should be determined by the realities of the situation, not merely by what he professes. A registrant is not entitled to exemption merely because he professes to be a minister, but he is entitled to such exemption if his work brings him within that classification.

"Selective Service Regulations (622.44) recognize two classes of ministers, (1) a regular minister of religion, and (2) a duly ordained minister of religion. The former 'is a man who customarily preaches and teaches the principles of religion of a recognized charge [*sic*, properly 'church'] religious sect, or religious organization of which he is a member . . .' The latter 'is a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church . . .' The Selective Service System has even more broadly defined the term 'regular minister of religion.' Under the heading, 'Special Problems of Classification' (*Selective Service in Wartime*, Second Report of the Director of Selective Service, 1941-42, pages 239-241), it is stated:

> "The ordinary concept of 'preaching and teaching' is that it must be oral and from the pulpit or platform. Such is not the test. Preaching and teaching have neither locational nor vocal limitations. The method of transmission of knowledge does not determine its value or effect its purpose or goal. One may preach

or teach from the pulpit, from the curbstone, in the fields, or at the residential fronts. He may shout his message 'from housetops' or write it 'upon tablets of stone'. He may give his 'sermon on the mount', heal the eyes of the blind, write upon the sands while a Magdalene kneels, wash disciples' feet or die upon the cross. . . . He may walk the streets in daily converse with those about him telling them of those ideals that are the foundation of his religious conviction, or he may transmit his message on the written or printed page, but he is none the less the minister of religion if such method has been adopted by him as the effective means of inculcating in the minds and hearts of men the principles of religion. . . . To be a 'regular minister' of religion the translation of religious principles into the lives of his fellows must be the dominating factor in his own life, and must have that continuity of purpose and action that renders other purposes and actions relatively unimportant."

". . . . There is not a scintilla of proof which impugns his honesty, good faith or devotion to the cause. Respondent makes no criticism of relator [Hull] in this respect. Neither has the Selective Service System of Ohio done so insofar as relator is individually concerned. Such criticism as is disclosed by the record was directed entirely at Jehovah's witnesses as a class."

There has not been a consistency in the classification of Jehovah's witnesses under the Act. Many men have been denied classification as ministers of religion when upon the same set of facts other boards have granted exemptions. Many boards have shown a deep-seated prejudice against Jehovah's witnesses. Thousands of men have been denied proper classification because the boards, acting upon what they considered to be a proper interpretation of Opinion Number 14, have applied the principles of the orthodox religious organizations in determining what is a minister

of religion. Discrimination has, at times, become so flagrant as to cause honest persons not connected with Jehovah's witnesses to condemn such action. A typical case is that of Floyd Eugene Hull, a registrant of Perry County, Ohio, Local Board Number 2, which is located at Somerset, Ohio. He moved to Lawrenceburg, Indiana, where he continued his ministry. In due course of time, having been denied his claim for exemption by his local board, the local board of Lawrenceburg was directed by the Ohio board to order him to report for training and service. The draft board file was forwarded to the Lawrenceburg board in order to complete the process. Upon a review of the draft board file the Lawrenceburg board wrote a letter of protest to the State Director of the Selective Service System for Indiana calling attention to the fact that Hull, a minister of religion, was being illegally dealt with by the Ohio board. The board, among other things, said: "We are not writing in the spirit of criticising the action of this man's own Local Board, but we certainly believe that there is a bad misunderstanding somewhere along the line. . . . In the second place, . . . he also is an ordained minister of Jehovah's Witnesses according to the qualifications of his own Sect. . . .

"While it is true that this Sect may not be held in such high esteem by various of the religious and others, inasmuch as it is recognized in Washington under the Selective Service Act, the same consideration should be given a minister of his faith as is accorded those of other more recognized faiths. . . ."

"We are ready and willing to carry out all orders from our Headquarters, but, in all fairness to this man, we feel that some sort of investigation should be made to find out just what is wrong, if anything, appearances certainly supporting this impression."

"We might add that the personnel in this office is made up of Methodists, Episcopalians, and Lutherans, and has no

interest in Jehovah's Witnesses except from the standpoint of fairplay according to Selective Service law and testimony, and consistency in handling recognized ministers of the Gospel." (Transcript of Record, *United States* ex rel. *Floyd Eugene Hull* v. *John Stalter*, No. 8869 October Term 1945, United States Circuit Court of Appeals for the Seventh Circuit). Following the release of Hull from custody through the judicial process his case was remanded to the Selective Service System for reprocessing.

Hundreds of other cases illustrating the lack of consistency and arbitrariness of innumerable local boards could be cited. Space in this brief will not be taken to demonstrate the point here made. An appendix to this brief, however, contains scores of typical cases according to categories. It is submitted that the cases stated in the appendix are available to this Court through the files of the Selective Service System which this Court can judicially notice.

B

The local board in the Kulick case deprived him of a full and fair hearing before the board of appeal through failure to reduce to writing oral evidence offered by Kulick upon his personal appearance. This action was contrary to the Regulations and violated his rights to procedural due process contrary to the due process clause of the Fifth Amendment to the Constitution.

The undisputed evidence showed that the local board failed to reduce to writing and place in the prisoner's file vital oral evidence submitted by him at a personal appearance relative to his status under the Act. When he was at the hearing he offered extensive additional oral evidence which was concededly received and considered by the local board. The local board, although it did hear the oral evidence, did not reduce it to writing and place it in the cover sheet as required by the Regulations. The board of appeal did not see or have an opportunity to consider all the additional evidence. It did not know of the action of the local

board in withholding vital oral evidence received and considered.

The Regulations require that the local board reduce to writing and place in the registrant's file all oral evidence submitted by him pertaining to his occupational status and classification. Section 615.82 provides, *inter alia*, "Every paper pertaining to the registrant, except his Registration Card (Form 1) . . . shall be filed in his Cover Sheet (Form 53)."

"The registrant's classification shall be made solely on the basis of the official forms of the Selective Service System and such other written information as may be contained in his file; . . . Oral information should not be considered unless it is summarized in writing and the summary placed in the registrant's file. Under no circumstances should the local board rely upon information received by a member personally unless such information is reduced to writing and placed in the registrant's file." (Section 623.2. See also Section 625.2(b), Regulations.)

"If any facts considered by the local board do not appear in the written information in the file, the local board shall prepare and place in the file a written summary of such facts." (Section 627.13(b))

Section 627.13 (b) of the Regulations required the local board to "carefully check the registrant's file to make certain that all steps required by the regulations have been taken and that the record is complete." The local board disregarded the regulations and acted in complete defiance thereof, thus flouting the law and showing utter contempt for Kulick's rights under the regulations.

The regulations intend that the classification upon appeal shall be *de novo:* The board of appeal and the President do not have an opportunity to permit the registrant to appear before them personally; they are confined in their consideration to the record made in writing. If the local board did not comply with the regulations requiring

it to make a full record of all the facts and evidence considered by it, the appeal agency of the Selective Service System would be entirely at the mercy of the local board. If a record was not made of all the facts and evidence which properly entered into the judgment of the local board, then the board of appeal would not be in as good a position to pass on the case as was the local board. The regulations contemplate that the local board shall make a record of all the evidence considered by it so that the board of appeal shall be in equally as good a position to pass upon the classification of a registrant as the local board.

The classification of I-A was affirmed or continued *de novo* solely because the local board failed to include the new oral evidence in the cover sheet. It must be conclusively presumed that the classification of Kulick would have been different and he would as a minister have been exempted from training and service had the local board complied with the Regulations and included a summary of his oral evidence in the file.

This is the precise question that was presented to the Third Circuit Court and to this Court in *Estep* v. *United States*, 150 F. 2d 768, 327 U. S. 114. However, in spite of the fact that neither court passed upon the merits of such defense, the two dissenting judges of the court of appeals exhaustively reviewed the law in this connection. Reference is made to their opinions. 150 F. 2d 768, 773-781. Cf. *Smith* v. *United States* (CCA-4) 157 F. 2d 176.

If a local board fails to reduce to writing oral evidence and which was received and heard by it, thus withholding such evidence from the appellate agencies of the Selective Service System, the local board will have been transformed into an autonomous agency and the appellate agencies of the Selective Service System made impotent, null and void and forced to depend for their effective operation exclusively upon the whim, caprice and will of the local board. If the regulation on reducing oral evidence considered by

the local board to writing is held to be for the benefit solely of the local board and that the judgment of the local board thereon is final, then the appellate agencies of the Selective Service System will have been deprived of their right to correct errors and illegal acts committed by the local board, contrary to the Regulations.

Certainly Congress did not intend to give the local boards unlimited power to withhold and keep from the appellate agencies evidence offered to it and considered by it under the Regulations. This is especially true because classifications upon appeal are made *de novo* and such classification should be made according to the status of the registrant at the time of the classification rather than at the time of the registration of the registrant. *United States* ex rel. *Hull* v. *Stalter*, 151 F. 2d 633 (CCA-7).

Since the board of appeal has the final say as to the classification to be accorded a registrant, it must be assumed that the authors of the Act and Regulations intended that the local board, in all cases where appeals were taken by the registrants, should perform a duty in behalf of the board of appeal very much like a master, referee or notary public taking a deposition. It is the function of the local board to gather all the evidence for consideration by the board of appeal or the President, which appellate agencies pass on all questions involved. If it were otherwise, so that the local board could withhold evidence, written documentary or oral, from the registrant's file forwarded to the board of appeal, the local board would have unlimited powers and arbitrary discretion to determine just what evidence the appellate agencies should or should not consider under Section 623 of the Regulations. Thus the authority of the appellate agencies could be circumscribed and their power sapped by whimsical actions of the local board.

"There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when the minimal requirement has

been neglected or ignored." CARDOZO, J., *Ohio Bell Tel. Co.* v. *Public U. Comm'n*, 301 U. S. 292, 304. See, also, *Shields* v. *Utah-Idaho* Central Ry., 305 U. S. 177, 182.

"Facts and circumstances which ought to be considered must not be excluded. Facts and circumstances must not be considered which should not legally influence the conclusion. . . . If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given." *Morgan* v. *United States*, 298 U. S. 468, 479-481.

In *Kwock Jan Fat* v. *White*, 253 U. S. 454, the administrative agency omitted and suppressed testimony of important witnesses favorable to the applicant. On appeal to the Commissioner of Immigration, the administrative determination was affirmed. In spite of the fact that Congress had given great power to the Secretary of Labor in the exclusion of Chinese immigrants, the Court said:

"It is a power to be administered not arbitrarily and secretly, but fairly and openly under the restraints of the traditions and principles of free government applicable where the fundamental rights of men are involved, regardless of their origin or race. It is the province of the courts in proceedings for review to prevent abuse of this extraordinary power, and this is possible only when a full record is preserved of the essentials on which the executive officers proceed to judgment. For failure to preserve such a record for the information not less of the Commissioner of Immigration and of the Secretary of Labor than for the courts, the judgment in this case must be reversed. It is better that many Chinese immigrants should be improperly admitted than that one natural-born citizen of the United States should be permanently excluded from this country."

Attention of the Court is called to the decision of the Fourth Circuit Court of Appeals in *Smith* v. *United States*, 157 F. 2d 176 (cert. denied 67 S. Ct. 189, rehearing denied 67 S. Ct. 367). There the identical proposition was raised

in the appellate court. That court held that it was a question of fact for the jury to decide as to whether or not the draft board had violated the Regulations. The circuit court held that the defendant was not entitled to have his motion for judgment of acquittal granted and the indictment dismissed at the close of all the evidence on account of the failure of the local board to reduce to writing the evidence offered. However, the facts in that *Smith* case can be distinguished from the facts in the *Kulick* case. In the *Smith* case the Government contended that there was an issue of fact as to whether or not Smith actually gave any oral evidence in addition to the written evidence appearing in the questionnaire. The chairman of the local board testified in the *Smith* case and disputed Smith's testimony as to the evidence Smith alleged he had given to the board at the time of his personal appearance. Here there is no dispute between the testimony of Kulick and the testimony of the clerk and members of the board. Both the clerk and members concede and contend that Kulick testified extensively about matters pertaining to Kulick's classification, including new evidence offered by Kulick. There is absolutely no dispute as to the fact that Kulick actually gave additional oral testimony at the time of his personal appearance. This fact is established from the Government's own witnesses. Therefore there was no issue of fact on this matter to be submitted to the jury. The undisputed evidence showed that the local board violated the Regulations in failing to reduce to writing the oral evidence offered by Kulick. Therefore the decision in *Smith* v. *United States* (157 F. 2d 176) does not apply. In any event, even if it did apply, the decision of the *Smith* case is erroneous and should not be accepted as authority here.

The withholding of evidence by the local board denied the final and real classifying agency of the Selective Service System the right to a full review of Kulick's case. The act of the local board was tantamount to a denial of the

right of appeal. It is a denial of procedural due process so as to make the order upon which the indictment is based void and the same as though no order had been issued. Under these circumstances the court below properly reversed the judgment and discharged the prisoner. Kulick says, however, that the court should have gone further and held that the illegality of the order was ground for dismissal of the indictment and a remand of the case to the Selective Service System. *Tung* v. *United States* (CCA-1) 142 F. 2d 919. Cf. *United States* v. *Peterson* (DC ND Calif.) 53 F. Supp. 760; *United States* v. *Lair* (DC ND. Calif.) 52 F. Supp. 393; Ex parte *Stanziale* (CCA-3) 138 F. 2d 312. It should be observed in the *Tung* case that the Government accepted the decision of the First Circuit as the law by not applying for certiorari, which was available to it.

Concluding Summary of Argument

The first question to be decided in these two cases is whether the judgments of conviction are void because of the denial of procedural due process by the convicting courts upon the trials of the prisoners. Orderliness of appellate procedure and due process of law in habeas corpus proceedings allows the Court to consider the second question presented by the prisoners only in the event that the Court finds the proceedings in the convicting courts did not invalidate the judgments. The second question of whether the judgments of convictions are void because of the invalidity of the supporting administrative proceedings will not be reached in event the Court finds that the judgments of conviction are void because of the denial of due process by the convicting courts.

Prisoners here claim that the convicting courts denied them their rights to be heard in their only defense that the orders of the draft boards supporting the indictments were invalid. They claim that the denial of such right to make

such defense was a violation of the Constitution so as to make the judgments subject to collateral attack on habeas corpus. The prisoners here also urge that the convicting courts did not acquire jurisdiction of the indictments because the administrative proceedings supporting the prosecutings were a nullity. The draft board proceedings were a nullity because the prisoners had no duty to obey the orders. The prisoners had no duty because they were exempt as ministers of religion under the Act.

The Court of Appeals for the Second Circuit properly concluded in the *Kulick* case that the convicting court had denied Kulick the right to defend his case. It held that this denial properly entitled Kulick to a discharge from custody. That court did not reach the second question of the invalidity of the administrative agency's proceedings. However, the Court of Appeals for the Fourth Circuit did reach the second question in the *Sunal* case. It held that the denial of the right to defend his case by the convicting court did not entitle Sunal to a discharge. Thereupon the court proceeded to determine if the administrative order supporting the indictment wa invalid. Contrary to Sunal's contention the court found that the draft board proceedings were valid.

It is suggested to the court here that the same results that were reached by the Court of Appeals for the Second Circuit should be reached by this Court in both of these cases. It would, therefore, be proper to discharge both prisoners here for the reason that the convicting courts deprived the prisoners of a vital constitutional right upon their trials. Even though the court of appeals in the *Kulick* case may have erred in holding that the writ of habeas corpus could be used as a writ of error or in lieu of an appeal its judgment ordering Kulick discharged should nevertheless be affirmed. The judgment of the court of appeals finds support, however, in the fact that the judgment of the convicting court is void because Kulick was denied a constitutional right to a judicial trial. Kulick may support his

favorable judgment on any ground that appears in the record. *Le Tulle* v. *Scofield*, 308 U.S. 415, 421; *Gainesville* v. *Brown-Crummer Co.*, 277 U.S. 54, 59; *Bell Telephone Co.* v. *Van Dyke*, 296 U.S. 533; *Laws* v. *Davis*, 281 U.S. 702. If for this reason the Court reaches the same results in the *Sunal* case for the same reasons the judgment of the court of appeals in that case should be reversed and the prisoner ordered discharged from custody.

The prisoners in both of these cases were denied a judicial trial contrary to the Constitution. The abridgment of their rights by the convicting courts makes the judgments of convictions void. In each case the error committed was of such an egregious character and so violative of the specific provisions of the Constitution as to be more than a mere error of law.

The convicting courts denied the prisoners their right to challenge the validity of the draft board orders in defense to the indictments because of the prevailing opinion among the lower federal courts that Section 11 of the Act did not allow the defense to the order in each case. The inferior federal courts had erroneously construed the statute so as to preclude the defense. The claim is made that this was a mere error in the construction of the statute and of this Court's opinion in the case of *Falbo* v. *United States*, 320 U.S. 549. It has been at all times apparent that such illegal construction of the Act finds no justification in the language of the Act or of this Court's opinion in the *Falbo* opinion. On the contrary, the construction was arbitrary and capricious because it was in defiance of the implicit provisions of the Act and of this Court's opinion in the *Falbo* case.

While it may be conceded that the construction of the statute was a mere error of the law in determining whether the rights of the prisoners have been violated it is not necessary to stop there. The matter should be pursued for a determination of whether the construction was unconsti-

tutional. Did the error result in the deprivation of the prisoners' constitutional rights? If it did, then it cannot be urged that the good faith and honest belief of the judge of the convicting court in the accepted construction of the Act eradicated the serious, grievous and egregious vice from the ruling. The honest belief of the judges of the inferior courts that they were properly construing the statute does not justify the violation of constitutional rights. The issue is, did the ruling deprive the prisoners of their constitutional rights and not whether the judges of the inferior federal courts honestly believed they were correct.

It is not fair to argue that the situation here in respect to the upheaval of the inferior court law by the decision of this Court in the case of *Estep* v. *United States*, 327 U.S. 114, is similar to the change in statutory construction in *Nye* v. *United States*, 313 U.S. 33, which precipitated the habeas corpus action in *Warring* v. *Colpoys*, 122 F. 2d 642 (App. D. C.) certiorari denied, 314 U.S. 678. The erroneous interpretations of the Act by the inferior federal courts now under consideration by this Court did not have the dignity of a construction of the statute. It is fundamental that a federal statute has no meaning until it has been formally interpreted by this Court. *Calhoun Gold Mining Co.* v. *Ajax Gold Mining Co.*, 182 U.S. 499, 505; *Knight* v. *Carter Oil Co.*, 23 F. 2d 481, 484. Unless and until this Court had construed the statute the interpretation and meaning placed upon the Act by the lower federal courts was not a construction of the statute. Furthermore, the interpretation was contrary to the conclusions that implicitly appeared from a reading of *Falbo* v. *United States*, 320 U.S. 549, and *Billings* v. *Truesdell*, 321 U.S. 542. Hence the putative construction put upon the statute by the lower federal courts was *ultra vires*. Moreover, the holdings in practically all the cases decided by the federal courts involved situations where the registrants had not reported and did not exhaust their administrative remedies. Therefore the state-

ments in the opinions that the registrant could not challenge the orders of the boards in prosecutions under the Act were purely dicta. The statements did not take on the dignity of holdings. Not being holdings, but dicta, it must be considered that the statements are not real constructions of the statute.

Irrespective of what the rule may be in the ordinary case of change in statutory construction the rule of the *Warring* case would not apply here. In these cases the denial of the right to be heard is as egregious an error as would have been the denial of counsel, the denial of right to trial by jury, the refusal of a plea of former jeopardy or any other similar denial of a constitutional right, which concededly would make a criminal convicting subject to collateral attack on writ of habeas corpus. A change in construction does not immunize the denial of due process against the writ of habeas corpus.

Denial of the right to challenge the validity of the orders was a denial of the right to be heard on whether the prisoners were guilty of failing to perform a duty under the Act. The holdings of the convicting courts were in plain violation of the rights of the prisoners to due process of law and judicial trials guaranteed by the Constitution. This vice in the judgments of conviction made them subject to collateral attack on habeas corpus. It also commands the discharge of the prisoners from custody. This duty to release the prisoners cannot be defeated by the holdings of the two district courts in both these cases and the court of appeals in the *Sunal* case that if the draft boards did not violate the law the violation of the law by the district court would be harmless error.

Accordingly the judgment of the court of appeals in the *Kudick* case should be affirmed and the judgments of the court of appeals and of the district court in the *Sunal* case should be reversed and the prisoners ordered discharged.

The prisoners are desirous to have the validity of the draft board orders judicially determined by this Court, as were Estep and Dodez in their cases. But, for the same reasons this Court refused to pass on the question in the *Estep, Smith, Gibson* and *Dodez* cases, and for other reasons discussed in this brief, the prisoners suggest that it is inappropriate to do so now in these cases, unless the Court holds that the denial of the right to be heard in the criminal trials is not sufficient to justify release on habeas corpus. In that event (if this Court would reach the question) if the Court holds that the scope of review is limited to a determination of the validity of the draft board proceedings and not the proceedings of the convicting courts, then the prisoners say they should, nevertheless, be discharged. This should be done because the draft board orders supporting the indictments are invalid.

Each of the prisoners is exempt from training and service because he is a minister of religion within the meaning of the Act and Regulations. This fact was established as a matter of law in that the undisputed evidence showed that they were regularly engaged full-time in their vocation as ministers of Jehovah's witnesses under the direction of the *Watchtower Society*, a recognized religious organization. The record establishes that the draft boards arbitrarily denied their claims for exemption because of their avocation. The evidence showed that the avocation in no way interfered with their vocation of preaching the gospel. Therefore the undisputed evidence shows that there was no basis in fact for the denial of their claims for exemption and that the orders were in excess of the jurisdiction of the boards.

The mere fact that the court of appeals in the *Kulick* case did not attempt to decide the validity of the draft board proceedings does not prevent this Court, in event it reaches the question of validity of the draft board orders, from holding upon the record made before the district court,

that the draft board order is invalid in spite of the failure of the court of appeals to pass upon the validity of the draft board order. In habeas corpus proceedings this Court is not limited to a consideration of the precise question passed upon by the court of appeals or the district court, but may consider any other ground raised in the record because the statutes require that the prisoners be disposed of as law and justice require. 26 Stat. 827, 28 U. S. C. § 345; *Storti* v. *Massachusetts*, 183 U. S. 138, affirming In re *Storti*, 109 F. 807. This is similar to the power of the Court in admiralty appeals. *Duche & Sons* v. *Schooner John Twohy*, 255 U.S. 77. Therefore this Court, if it reaches the question, is in the *Kulick* case equally empowered to pass on the validity of the draft board's determination as it is in the *Sunal* case.

Conclusion

Wherefore respondent Kulick and petitioner Sunal pray that they be discharged from custody. Therefore the judgment of the court of appeals reversing the order of the district court and discharging Kulick should be affirmed and the judgment of the court of appeals and the order of the district court should be reversed and Sunal ordered discharged.

Respectfully submitted,

HAYDEN C. COVINGTON
Counsel for Kulick and Sunal

FILE COPY

MAR 29 1947

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946

□

No. 840

MYRL E. ALEXANDER, WARDEN
Petitioner

v.

UNITED STATES OF AMERICA ex rel.
JOHN MYRON KULICK
Respondent

ON CERTIORARI TO
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT

□

No. 535

THEODORE MARTIN SUNAL
Petitioner

v.

DAVID R. LARGE, SUPERINTENDENT
Respondent

ON CERTIORARI TO
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FOURTH CIRCUIT

□

APPENDIX

TO JOINT BRIEF FOR RESPONDENT KULICK AND PETITIONER SUNAL

HAYDEN C. COVINGTON
Counsel

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APPENDIX

In the brief for these prisoners it is stated that the administration of the Selective Training and Service Act of 1940 was not consistent in all cases.

The purpose of this appendix is to submit substantial proof that Jehovah's witnesses have not been dealt with equally under the law. On identical facts presented to the various draft boards the determinations were not the same.*

I

Men whose boards had granted them exemption as ministers of religion (Class IV-D), and who were thereafter ordered to do training and service without a showing of change in status.

Some boards granted the claim for exemption while other boards, on the same facts, denied the claim for exemption. The most flagrant examples of arbitrary action, however, were where men were originally granted IV-D exemption and thereafter removed from the exempt status and classified as liable for training and service. A few of these cases typical of this arbitrary action are listed below:

(1) John E. Adams registered with Local Board No. 1, Charleston, West Virginia, in October, 1940. He had been one of Jehovah's witnesses since 1938. He claimed classification as a minister, although at the time he was not engaging as such full-time, but only as a "company publisher". On July 25, 1941, the local board, based on his claim in the questionnaire, placed him in Class IV-D. He entered the full-time pioneer ministry on October 12, 1942. Thereafter the local board withdrew the exempt classification and placed him in Class I-A and he was then placed in

* Many of the cases here referred to are available to this Court through an examination of the printed records filed in this Court. The great majority of cases referred to, however, are not thus available to this Court. But such cases are subject to the judicial notice of the Court. *Bowles* v. *United States*, 319 U. S. 33, 35.

Class IV-E. He thereupon wrote to the Director of Selective Service and the President to take an appeal in his behalf. This was refused. He failed to report for final-type physical examination because exempt as a minister. Upon trial of his case before Judge Ben Moore, a verdict of acquittal was directed because Adams was entitled to IV-D classification and was under no duty to report. The local board thereafter requested additional data concerning Adams' ministerial status from Adams and the local congregation at Charleston, West Virginia, and upon receipt thereof continued his IV-E classification in July, 1944. On December 6, 1944, he was again placed in Class IV-D by the board of appeal.

(2) Winfield A. Counts registered with Local Board No. 2, St. Petersburg, Florida, in October, 1940. He had been one of Jehovah's witnesses since 1939. He claimed Class IV-D. At the time he was engaged as a part-time minister (company publisher). Upon his questionnaire and claim, the local board, on June 24, 1941, placed him in Class IV-D, exempting him from training and service as a minister of religion. On July 1, 1943, he arranged his affairs to engage full time as a pioneer minister. Upon his informing the local board of his full-time status as a minister, the local board reclassified him, withdrawing his exempt classification and placing him in Class IV-E, July 19, 1943. On appeal, he was retained in Class IV-E by the board of appeal on September 13, 1943. He passed preinduction physical examination on January 14, 1944, and thereafter, on May 11, 1944, was ordered to report to a civilian public service camp. He reported and left the camp. On March 22, 1945, he was convicted and sentenced to two years' imprisonment.

(3) Paul R. Erickson registered with Local Board No. 1, Chariton, Iowa, on July 1, 1941. He claimed classification and exemption as a minister of religion in his questionnaire

and the local board recognized such claim by placing him in Class IV-D. He had been one of Jehovah's witnesses since 1939 and at the time of filing his questionnaire was a part-time (company publisher) minister. On April 1, 1942, he commenced his full-time pioneer ministry. On April 2, 1942, the local board withdrew his exempt classification and changed him to Class IV-E, making him liable for training and service. He timely appealed. On July 13, 1942, he filed a copy of his certificate of ordination. On August 28, 1942, the board of appeal changed his classification to I-A. He was thereafter ordered to report for induction on October 13, 1942. He failed to report. The local board had arbitrarily informed National Headquarters of Selective Service System that he had not claimed ministerial classification contrary to the facts. On October 19, 1943, he was convicted and sentenced to four years' imprisonment.

(4) Stanley J. Flakowicz registered with Local Board No. 252 of Forest Hills, New York City, December 21, 1942. He filed his questionnaire in January, 1943, claiming exemption and IV-D classification. Upon the evidence submitted the local board placed him in Class IV-D on January 29, 1943, thus exempting him from training and service as a minister of religion. He retained such exempt classification until September 27, 1943, when he was requested to appear before the local board due to the board's having received an anonymous, unsigned, undated letter on August 31, 1943, complaining against Flakowicz's exemption. On September 27, 1943, he was reclassified to I-A, after filing additional evidence as to his ministerial status. He was allowed a personal appearance pursuant to the Regulations on October 13, 1943, at which time he filed further evidence as to his exempt status. On October 15, 1943, his I-A classification was continued by the local board, whereupon he appealed and filed a statement of appeal. The board of appeal affirmed the I-A classification on November 1, 1943. He

was accepted by the armed forces upon a preinduction physical examination on January 31, 1944. He declined to report for induction on March 8, 1944, and was thereafter convicted and sentenced to serve three years' imprisonment on June 8, 1944. Upon appeal to the Circuit Court of Appeals the judgment was affirmed on January 22, 1945. (146 F. 2d 874) Certiorari was denied, 325 U. S. 851. In this connection attention is drawn to the decision of the Second Circuit Court of Appeals in *United States* ex rel. *Kulick* v. *Kennedy* on October 29, 1946, 157 F. 2d 811, where the court said: "Moreover, although a number of the decisions could be explained upon the ground that those inducted had not wholly exhausted their administrative remedies; in a number of others they had done so; and no distinction had been established between the two. Indeed, in *United States* v. *Flakowicz*, supra (146 F. 2d 874), which had been one of these, the Supreme Court denied certiorari only a fortnight before May 12. While that court has said over and over again that such denials are not to be taken as affirmances, it was not to be expected on May 12, 1945, that the court would grant a writ in precisely the same circumstances in which it had just denied one." On December 4, 1946, Flakowicz was released on habeas corpus. It should be noted that long prior to his registration and to the date of his sentence Flakowicz served as a full-time pioneer minister.

(5) David W. Garvin, Jr., registered with Local Board No. 2, Pittsburgh, Pennsylvania, July [illegible] 1941. He filed his questionnaire claiming ministerial exemption. In harmony therewith the local board exempted him from training and service and placed him in Class IV-D on September 8, 1941. He had been one of Jehovah's witnesses since 1934, serving as a part-time minister of the Allegheny Unit of the Pittsburgh, Pennsylvania, Company of Jehovah's witnesses. Pursuant to a letter received by the local board from State Headquarters, it wrote Garvin on April 7, 1944, that his classification was reopened and that he should appear

for a hearing on April 14, 1944. He appeared and discussed extensively his ministerial status and filed information in support of his IV-D claim. On April 18, 1944, the local board placed him in 1-A, withdrawing his exempt classification, making him liable for training and service. He was granted a personal appearance for April 28, 1944, when he again discussed extensively his ministerial claim and filed additional written material. On the same date the local board continued his 1-A classification. On June 21, 1944, the local board reclassified him to IV-E, making him liable for assignment to a civilian public service camp. He again appeared before the board on June 23, 1944, and the board not changing his classification, he appealed. The local board did not reduce to writing, as required, the oral evidence given at his personal appearance, thus depriving the board of appeal of information considered by the local board. On July 10, 1944, the board of appeal affirmed the IV-E classification. On July 9, 1945, the local board again placed him in Class IV-E, from which he appealed. On October 1, 1945, the board of appeal reclassified him to 1-A. He was accepted by the armed forces for training and service upon a preinduction physical examination on September 6, 1946. He was directed to report for induction on October 7, 1946. He reported in order to exhaust his administrative remedies but declined to submit to induction. On December 20, 1946, he was found guilty of violating the Act. His sentence is pending.

(6) Otto A. Jensen registered with Local Board No. 723, Valley Stream, New York, February 15, 1942. He filed his questionnaire on May 15, 1942, claiming Class IV-D as a minister of religion. Upon his claim and evidence submitted with his questionnaire, the local board placed him in Class IV-D on May 20, 1942. He had been one of Jehovah's witnesses since 1936 and was a part-time minister when he filed his questionnaire, but also served as assistant to

the presiding minister of the Jamaica Unit of the New York Company of Jehovah's witnesses, in the capacity of "territory servant". On December 21, 1942, he filed with the local board a certificate showing his appointment as a full-time pioneer minister on August 22, 1942. The local board thereupon arbitrarily reclassified him to Class IV-E on January 8, 1943. Following a personal appearance on January 10, 1943, he was continued in IV-E, whereupon he appealed. On August 17, 1943, the board of appeal reclassified him to 1-A. The local board ordered him to report for induction on November 23, 1943. He did not report and was thereafter sentenced to serve three years imprisonment on March 27, 1944. His case was affirmed upon appeal. (146 F. 2d 874) Certiorari was denied, 325 U. S. 851.

(7) John M. Kulick registered with Local Board No. 254, Jackson Heights, New York City, June 30, 1942. He filed questionnaire in November, 1942, claiming exemption and IV-D classification as a minister of religion. He was classified in 1-A on March 29, 1943. He requested a personal appearance, which was denied, the board stating that it was still considering the evidence filed with his questionnaire. The local board thereupon placed him in Class IV-D on April 28, 1943, upon receipt of further written evidence from Kulick. He was retained in Class IV-D until August, 1944. On August 23, 1944, the local board received a telephone message from the clerk of Local Board 255 informing Kulick's local board that "a mother of three sons in service" was at Board No. 255, complaining against Kulick. On this hearsay evidence, Kulick was deprived of exempt classification and placed in Class 1-A. Upon a personal appearance on August 30, 1944, Kulick explained that he spent but two hours weekly at secular work in order to support himself in the ministry. He gave extensive oral evidence which was not reduced to writing by the local board as required. He also filed additional written evidence in behalf of his minis-

terial claim. The local board continued him in I-A on August 31, 1944. He appealed on September 8, 1944, and reviewed his ministerial status in a statement of appeal. He was accepted upon a preinduction physical examination on September 11, 1944. The board of appeal affirmed the I-A classification on October 3, 1944. He was ordered to report for induction on November 9, 1944. He reported to exhaust his administrative remedies, but declined to submit to induction. On May 3, 1945, he was sentenced to serve three and one-half years' imprisonment. On May 6, 1946, habeas corpus was denied. Upon appeal, the case was remanded and he was released on habeas corpus.

(8) William H. Lohrberg registered on October 16, 1940, with Local Board 267, New York City. He filed questionnaire claiming IV-D classification as a minister of religion. Upon his claim and evidence submitted with his questionnaire, the local board placed him in Class IV-D on October 16, 1941. He had been one of Jehovah's witnesses since 1939 and was, at the time, a part-time minister, and assistant to the presiding minister of his congregation. On March 28, 1942, he abandoned secular activity and was appointed as a full-time pioneer minister. Subsequent thereto the local board, on August 14, 1942, deprived him of his ministerial classification and exemption and placed him in Class IV-E. Upon appeal, the IV-E classification was affirmed on February 3, 1943. He declined to report for induction after having been accepted upon a final-type physical examination. Thereupon he was sentenced to three years' imprisonment on December 3, 1943. Habeas corpus was denied on January 8, 1944. The Fourth Circuit Court of Appeals affirmed, March 17, 1944, (141 F. 2d 689) and certiorari was denied on May 22, 1944, 322 U. S. 744.

(9) Pasqual Pellechia registered with Local Board No. 1, Bangor, Pennsylvania, in October, 1940. He filed questionnaire on August 29, 1941, claiming IV-D classification and

exemption. Based thereon the local board placed him in Class IV-D on October 10, 1941. He had been one of Jehovah's witnesses since the summer of 1940 and was, at the time, serving as a part-time minister. On October 28, 1942, he was appointed as the Assistant Company Servant of the Bangor Company of Jehovah's witnesses and on January 1, 1943, he commenced his full-time ministry as a pioneer. He filed evidence thereof with his local board so they would be apprised of his full-time ministerial status. The local board, in spite of his advice to them, reclassified him to IV-E, denying his IV-D exemption, on October 14, 1943. He was granted a personal appearance for October 26, 1943, at which time he discussed his ministry and filed considerable written evidence. He was continued in Class IV-E by the local board and appealed on October 27, 1943. The board of appeal affirmed the Class IV-E on December 3, 1943. Failing thereafter to appear for induction, he was tried for a violation of the Act and sentenced to serve five years' imprisonment in September 1944.

(10) Alex Prostka registered with Local Board No. 263, New York City, on October 16, 1940. He became active as one of Jehovah's witnesses in January, 1941, associating himself with the Jamaica Unit of the New York Company of Jehovah's witnesses. He was placed in Class I-A by the local board on November 13, 1941. He thereafter filed with the board adequate proof of his ministry and was recognized by the local board for exemption and accordingly given Class IV-D on January 30, 1942. On October 7, 1942, he relinquished all secular work and became a full-time pioneer minister. The next day, October 8, 1942, the local board withdrew his IV-D and placed him in Class I-A. He appealed therefrom and for the return of his IV-D on October 16, 1942, submitting documentary proof along with his statement of appeal as to his full-time ministerial status. The board of appeal reclassified him to I-A on February,

1943. The Director of Selective Service failing to intercede in his behalf he was ordered to report for induction, failed to do so, and was thereafter sentenced to serve a period of three and one-half years' imprisonment on June 12, 1943.

(11) Sam Pysh, Jr., registered with Local Board No. 9, Gary, Indiana, February 16, 1942, and thereafter filed his questionnaire claiming exemption and classification in IV-D. He had been associated with Jehovah's witnesses all his life and particularly active since 1936. The local board placed him in Class I-A on August 14, 1942. He appealed therefrom for Class IV-D, filing additional evidence of his ministry with his appeal statement. On October 1, 1942, he became a full-time pioneer minister. On November 13, 1942, he appeared before a Hearing Officer of the Department of Justice with four witnesses, each testifying as to his ministerial status. He was placed in Class IV-E by the board of appeal on January 28, 1943. He filed additional evidence with the local board on February 4, 1943, and requested a reopening of his classification, pursuant to the Regulations. Such evidence consisted of his ordination certificate and other pertinent data. Based thereon the local board placed him in Class IV-D on February 8, 1943. The Government Appeal Agent of the local board appealed from the IV-D classification on February 25, 1944, and the board of appeal withdrew his IV-D on April 8, 1944, and placed him in Class IV-E. On May 5, 1944, he discussed his case with the Government Appeal Agent who stated that he was now of the opinion that the IV-D classification should not have been appealed from and accordingly on May 12, 1944, the Government Appeal Agent asked the State Director to reconsider the case. Nothing was done. He was accepted upon a pre-induction physical examination on May 12, 1944, thus exhausting his administrative remedies. Failing to report to a civilian public service camp, he was subsequently sentenced to serve five years' imprisonment on December 28, 1944.

(12) Walter Pysh registered with Local Board No. 9, Gary, Indiana, October 16, 1940, and thereafter filed his questionnaire claiming exemption and classification in IV-D. He had been associated with Jehovah's witnesses all his life and particularly active since 1938. Based on his ministerial claim the local board placed him in Class IV-D on April 28, 1941. The local board thereafter, on July 20, 1942, reclassified him to 1-A-O, but on appeal to the local board, it restored the IV-D to him on August 8, 1942. The State Director thereupon appealed his IV-D to the President and on August 26, 1942, the President placed him in Class IV-E. On October 12, 1942, he entered the full-time pioneer ministry and filed evidence thereof with the local board and the local board reopened his case again (even though he had been ordered to report for induction) and placed him in Class IV-D on February 8, 1943. In February, 1944, the Government Appeal Agent appealed this IV-D classification to the board of appeal. On April 7, 1944, the board of appeal placed him in Class IV-E. He was accepted upon a preinduction physical examination on May 12, 1944, thus exhausting his administrative remedies. Failing to report to a civilian public service camp, he was subsequently sentenced to serve five years' imprisonment on December 28, 1944.

(13) Walter Pytlak registered with Local Board No. 25B, Shelton, Connecticut, February, 1942, and thereafter filed questionnaire in April, 1942, claiming exemption and classification as a minister in Class IV-D. The board, based on information filed with the questionnaire, placed him in Class IV-D on May 22, 1942. Arrangements were then in effect with National Headquarters of Selective Service System to add names of pioneers, registering, to the official list. Upon application made the request was denied because he already had Class IV-D and adding his name would serve no useful purpose. He had been one of Jehovah's witnesses since 1936 and had been serving as a full-time pioneer min-

ister since October 1, 1941. On July 8, 1942, the local board took him out of Class IV-D due to his name's being denied admission to the certified official list by National Headquarters. On August 11, 1942, he was placed in Class I-A. He timely appealed and the board of appeal reclassified him to IV-E on May 28, 1943. A final-type physical examination was given him on September 28, 1943, at which time he was accepted for training and service, thus exhausting his administrative remedies. On failing to report for induction on November 30, 1943, he was arrested and thereafter sentenced in February, 1944, to serve two years' imprisonment.

(14) Henry W. Rusk registered with Local Board No. 2, Atlanta, Georgia, and thereafter filed questionnaire on August 26, 1942, claiming exemption and classification as a minister of religion. Based on such claim and other information filed with the questionnaire, the local board placed him in Class IV-D on September 10, 1942. In September, 1943, a neighbor telephoned the clerk complaining that he believed Rusk should be in the military service like all the other neighbors. Based on such complaint the local board reopened the case and reclassified him to IV-E on October 7, 1943. He was not notified of such classification but merely ordered to take a preinduction physical examination, October 14, 1943. He took the examination and was accepted. On requesting the board on that date to give him reason why he had been asked to take the examination, and that his ministerial status had not changed, they gave him no information as to his change of classification, as to the complaint, or that his classification had even been reopened, and did not mail his new classification advice to him until he left the board. He thereupon requested a personal appearance and an appeal. Upon appeal his IV-E classification was affirmed and he was thereafter ordered to report for work of national importance on January 8, 1944. Having exhausted his administrative remedies at his acceptance on preinduc-

tion physical examination, he did not report for work of national importance and was thereafter arrested and, on trial, sentenced to serve two years' imprisonment on August 1, 1945. The Fifth Circuit Court of Appeals affirmed on April 15, 1946. (154 F. 2d 763) Certiorari was denied on June 10, 1946. 66 S. Ct. 1380.

(15) Jack B. Ryals registered with Local Board No. 1, Atlanta, Georgia, October, 1940. He thereafter filed questionnaire claiming exemption and classification as a minister of religion in Class IV-D. He had been one of Jehovah's witnesses since 1933 and had served as a minister of the Atlanta, Georgia, Company of Jehovah's witnesses since August, 1939. He was first placed in Class IV-E by the local board and, on appeal to the board of appeal, continued in such classification. On July 5, 1941, he directed a letter to the Director of Selective Service asking that an appeal be taken to the President in his behalf. On August 15, 1941, he was mailed an order to report for work of national importance on August 28, 1941. Before the date he was to report the Director of Selective Service took an appeal to the President, who reversed the local and appeal boards and placed him in Class IV-D on September 17, 1941. In making the decision to give him IV-D, the President, among other things, said: "The evidence of record in this case is convincing that the registrant is a Jehovah's Witness and that he is recognized and accepted as a minister by those toward whom he stands in the relation as a minister. Based upon the facts of record the registrant is reclassified and placed in IV-D." About eight months later, at the instance of the State Director, the local board revoked the Presidential IV-D classification and placed him in IV-E. Upon appeal, the IV-E classification was affirmed by the board of appeal. In January, 1943, he was ordered to report for work of national importance. Failing to do so, he was arrested and brought to trial, in May, 1944, before Judge Marvin E.

Underwood, who directed a verdict of "not guilty" because of the lack of evidence in the record that his ministerial status had changed since being exempted by the President. He was thereafter directed to appear before the local board. The board admitted there had been no change in his status. He filed much documentary evidence in support of his claim. In spite of this the local board again placed him in Class IV-E and the classification was again affirmed by the board of appeal. In view of such arbitrary action by the local and appeal boards the Director of Selective Service took another appeal to the President and Mr. Ryals was again classified by the President in Class IV-D on November 30, 1944.

(16) Rutherford G. Sakatos registered with Local Board 212, Los Angeles, June, 1942. He filed questionnaire claiming exemption and IV-D classification. Based thereon, the local board recognized his exempt status and placed him in Class IV-D on January 27, 1943. He had been one of Jehovah's witnesses all his life. He had served as a full-time pioneer minister from July 1, 1940, until March 12, 1942, when it was necessary for him to engage in secular work to care for his ill mother. He was engaged in such secular work when placed in Class IV-D by the local board. On March 1, 1943, he was appointed as assistant to the presiding minister of the Hollywood Company of Jehovah's witnesses. Upon request of the local board on September 5, 1944, for additional evidence, he informed them of his position with the Hollywood company of Jehovah's witnesses. On September 18, 1944, the local board placed him in Class I-A, whereupon he requested a personal appearance. He was accepted by the armed forces for training and service at a preinduction physical examination on October 19, 1944. On October 24, 1944, he appeared and presented additional evidence and discussed his ministerial status and requested the return of the IV-D. He was continued in

Class I-A and he thereupon appealed, filing a copy of ordination certificate. The board of appeal affirmed on December 27, 1944. He failed to report for induction on February 8, 1945, and was sentenced to serve one year's imprisonment in April 1945. Upon conditional release from prison in January, 1946, he resumed his full-time ministerial work as a pioneer and so informed the local board. On June 5, 1946, the local board again placed him in Class I-A and retained him therein on July 2, 1946, following a personal appearance. The board of appeal affirmed such classification on September 30, 1946. Upon request to the Director of Selective Service, an appeal was taken to the President by the Director and, on January 22, 1947, the President classified him in IV-D.

(17) Hayes Turner registered with local board at Perry, Georgia, February 16, 1942. In his questionnaire he claimed exemption and classification as a minister in IV-D. He had been associated with Jehovah's witnesses since October, 1939. He had served as a full-time pioneer minister from November, 1940, to March, 1941, when, due to illness, he relinquished his full-time status. He resumed his full-time status on January 1, 1942, and was so serving at the time of his registration. Based on his claim and documentary proof he was placed in Class IV-D by the local board on May 22, 1942. He remained in such classification until January 15, 1945, when with no change in his ministerial status to warrant a change of classification, the local board placed him in Class IV-E. It was admitted there was no written information on file to show any change in his status. He filed a statement of appeal showing he was still engaged in full-time ministry. He was accepted by the armed forces on a preinduction physical examination on April 30, 1945. On September 14, 1945, the local board mailed classification advice showing that the board of appeal had reclassified him to I-A, and also mailed him an order to report for in-

duction on September 25, 1945. Instead of reporting he mailed a letter to the board explaining why he could not report. Upon trial he testified he had been denied a personal appearance by the board, having been falsely informed by the clerk that he *had* to appeal. On April 19, 1946, he was sentenced to serve two years' imprisonment. The Fifth Circuit Court of Appeals affirmed the judgment on October 30, 1946, *per curiam*. Certiorari was denied March 3, 1947.

(18) Richard E. Ullery registered with Local Board No. 142, Santa Barbara, California, April 22, 1944. He had been one of Jehovah's witnesses all his life. He was appointed as a full-time pioneer minister on July 1, 1942. He filed questionnaire claiming exemption and classification as a minister of religion. He filed considerable information concerning his ministerial activity. Upon the claim and evidence, the local board placed him in Class IV-D on May 18, 1944. The Government Appeal Agent appealed his case to the Board of Appeal which placed him in Class I-A. The local board thereupon informed the State Director that it was of the opinion that Ullery should be exempted and asked him to appeal the case to the President. The State Director refused to act. Ullery was accepted upon a preinduction physical examination on August 18, 1944. He was thereafter ordered to report for induction on October 12, 1944. He reported but declined to submit, whereupon he was arrested and brought to trial. The case was tried on January 5, 1945. The verdict of the jury was guilty. Federal Judge Claude McCulloch thereafter, on January 29, 1945, ordered the jury's verdict set aside and a new trial, on the ground that the board of appeal could not reverse a local board's decision on a record that contained no adverse evidence. Thereafter the case was dismissed. The local board directed Ullery to submit information as to his present status. Upon doing so, Ullery was again placed in Class IV-D by the local board.

(19) Hayward D. Ward registered with Local Board No. 1, Eastville, Virginia, June 30, 1942. He had been one of Jehovah's witnesses since 1939 and had served as an assistant to the presiding minister and as presiding minister, at Painter, Virginia. He requested classification as a minister of religion. In December, 1942, he was placed in Class IV-E. He appeared before the board and was thereafter placed in Class IV-D on January 13, 1943. In May, 1944, the board reclassified him to I-A, which classification was affirmed by the board of appeal on July 5, 1944. He failed to report for induction on August 1, 1944, and thereafter he was tried for violation of the Act on October 17, 1944. The case was nol prossed due to an error in the indictment. He thereupon entered the full-time pioneer ministry and so informed his local board. He thereafter received an order to report for induction on February 6, 1945. He complied with the order but declined to submit to induction. On June 26, 1945, he was tried before Judge Ben Moore at Charleston, West Virginia. He represented himself in court. Sentence was deferred after the judgment of guilty pronounced by the jury. The case was thereafter dismissed by Judge Moore. In May, 1946, the local board returned his Class IV-D.

II

Men denied exemption but after conviction and serving prison terms classified as ministers.

There are listed below a few typical cases of refusal by the draft boards to grant the exempt classification of IV-D where the records clearly indicated the men were entitled thereto under the Act, resulting in unnecessary convictions and prison sentences, and subsequent recognition of the exemption after the sentence was served.

(1) Joel C. Adams registered with Local Board 1, Highland Park, Illinois, in February, 1945, and thereafter filed questionnaire claiming exemption and IV-D classification. He filed considerable information showing he regularly performed ministerial duties. He had been one of Jehovah's witnesses since 1938 and had served as a full-time pioneer minister since June 1, 1943. The local board refused to recognize his claim and placed him in Class I-A on March 1, 1945. At a personal appearance he thoroughly discussed his ministerial activity and filed additional proof in writing. The local board, following the personal appearance, continued his I-A classification, whereupon he appealed. The board of appeal unanimously affirmed the I-A classification on April 27, 1945. While his file was at the board of appeal, he was accepted upon a preinduction physical examination as fit for training and service by the armed forces on April 7, 1945. He requested the Director of Selective Service to intercede in his behalf and take an appeal to the President to avoid an injustice. No action was taken and on May 10, 1945, he received an order to report for induction on May 21, 1945. He failed to report and was thereafter arrested and indicted on July 16, 1945. On July 28, 1945, he was appointed as company servant and presiding minister of the Waukegan, Illinois, company of Jehovah's witnesses. His case was set for trial before the United States District Court at Chicago on November 15, 1945. Mr. Adams

presented his case in detail to the Director of Selective Service. When the case was called on November 15, 1945, the Assistant United States Attorney moved for a postponement to permit a review by National Headquarters of Selective Service, looking to a Presidential appeal. On February 14, 1946, Mr. Adams was mailed notice of Class IV-D by the President. In view of such action the United States Attorney moved for dismissal of the indictment, which was ordered by Judge Campbell on February 27, 1946.

(2) Francis H. Clanton registered with Local Board No. 1, Jacksonville, Illinois, October, 1940. He claimed classification as a minister in Class IV-D when filing his questionnaire. He filed documentary evidence showing he served as a minister of the local congregation of Jehovah's witnesses. He had been one of Jehovah's witnesses since 1938. The local board refused to recognize his claim but placed him in Class IV-E. He held thereafter Class 1, 1-H, 1-A, and on appeal to the board of appeal, IV-E on June 23, 1942. On September 25, 1942, he was directed to report for work of national importance. Failing to do so, he was arrested, tried and sentenced on January 18, 1943, to serve a year and a day imprisonment. Upon release in November, 1943, he entered the full-time pioneer ministry. The local board thereafter placed him in Class 1-A. Upon appeal he was given Class IV-D in June, 1944.

(3) Charles M. Clayton registered with Local Board No. 3, Welch, West Virginia, December 23, 1942. He filed his questionnaire February 18, 1943, claiming exemption and IV-D classification and showing that he was a full-time pioneer minister and had been since May 8, 1939. He filed documentary proof of his ministerial status with the questionnaire. The local board refused to recognize his claim and placed him in Class 1-A on April 19, 1943. He appeared for a hearing before the board on April 29, 1943. Being

refused a reclassification he appealed, stating that he had never been informed of the action taken by the local board following his personal appearance. The local board requested additional information concerning his claim and he filed a statement on June 7, 1943, giving a complete history of his ministerial background and claim, including therewith many affidavits from others concerning his status. On July 1, 1943, the board of appeal affirmed the 1-A classification. He was thereafter directed to report for induction on July 27, 1943. He failed to report. Upon the trial of his case on January 24, 1944, he was convicted. He was sentenced to *ten days* imprisonment and placed in the custody of the Attorney General. The reason he was given only ten days sentence was because the district judge in pronouncing sentence reviewed the draft board file and reached the opinion that Clayton should have been exempted as a minister of religion. Following the service of his sentence upon discharge from custody, Clayton requested the local board to reopen his case and honor him with Class IV-D. He supplied the board with pertinent portions of Judge Moore's remarks at the time of pronouncing sentence. On September 26, 1944, he was accepted upon a preinduction physical examination. On October 9, 1944, he was again placed in Class 1-A. He filed statement of appeal, supported by affidavits from a number of ministers. On December 12, 1944, he was mailed advice showing that the board had affirmed the 1-A classification. On December 22, 1944, the local board informed him that the classification was by the local instead of the board of appeal and that his file was at that time being transmitted to the board of appeal. On February 19, 1945, the board of appeal affirmed the 1-A classification. On the same date the President took an appeal in his behalf and subsequently rendered a IV-D classification to him on March 8, 1945.

(4) Robert K. Deysher registered with Local Board No. 3, Reading, Pennsylvania, October, 1940. He filed his

questionnaire in February, 1941. In May, 1941, he was classified by the local board in I-A and granted a personal appearance. At the personal appearance he discussed his ministerial status with the local board and was thereafter placed in Class IV-D. On June 30, 1941, he was reclassified to IV-E. When he appeared before the board, he was informed that the IV-D classification had been a "typographical error". The IV-E classification was affirmed by the board of appeal on September 15, 1941. He was ordered to report for assignment to a civilian public service camp on December 9, 1941. He was sentenced to eighteen months' imprisonment on January 15, 1942. Upon his release from prison, the local board again processed him for induction. His order to report for induction on September 28, 1943, was postponed, due to his having entered full-time pioneer ministry. His case was thereupon reopened and he appeared before the local board on October 18, 1943, thoroughly discussed his ministerial status and filed additional documentary evidence. As a result of the hearing and examination of the additional evidence, the local board placed him in Class IV-D on November 16, 1943.

(5) Garland P. Flythe registered with Local Board No. 1, Courtland, Virginia, October, 1940. He claimed exemption and classification as a minister. He was appointed as presiding minister of the Franklin, Virginia, colored Company of Jehovah's witnesses on November 10, 1942. In 1943 he was placed in Class I-A, whereupon he appeared before the local board and discussed his ministerial status. Upon appeal, his I-A classification was affirmed. Upon failing to report for induction he was sentenced to two years' imprisonment on June 6, 1944. Upon release from prison he resumed his ministerial status as minister as aforesaid. He was thereafter ordered by his local board to report for a pre-induction physical examination on June 12, 1946. Upon such examination he was accepted for training and service by the

armed forces. On June 25, 1946, he was again placed in Class I-A, which represented a reclassification from IV-A given him upon his release from prison. He requested a personal appearance pursuant to the Regulations. The local board, in defiance of the Regulations, denied him the personal appearance. Upon seeing the chairman of the board personally, he was again denied personal appearance. Upon his writing to the State Director, his request was granted and he appeared and discussed his classification and produced documentary evidence for filing with the board. The local board denied his IV-D claim, and the board of appeal, on October 7, 1946, continued him in Class I-A. Thereafter, the President, upon an appeal taken by the Director of Selective Service, rendered the IV-D classification.

(6) Joe T. Gibson registered in July, 1943, with Local Board No. 5, High Point, N. C., and on August 12, 1943, filed questionnaire claiming exemption and IV-D classification. He had been active as one of Jehovah's witnesses since January, 1939. He had been serving as a full-time pioneer minister since June, 1943, and as the presiding minister of the local congregation of Jehovah's witnesses since July, 1943. He filed proof of his ministry with his questionnaire. On September 9, 1943, the local board placed him in Class IV-E inasmuch as he filed a special form for conscientious objector. He timely appealed. Thereafter an agent of the FBI visited him and was informed that his exclusive claim was as a minister under Section 5 (d) of the Act. The board of appeal, on December 28, 1943, reclassified him to I-A. He was thereafter directed to report for induction on January 20, 1944. Upon trial for failure to report for induction Gibson's denial of IV-D was accounted for by the clerk of the local board solely on the ground that he had no affirmative evidence in his file that he performed marriages and conducted burial services. The clerk stated that there was not a scintilla of evidence to contradict his

ministerial claim. The court said he believed Gibson was entitled to Class IV-D, but he was bound by the *Falbo* decision of the Supreme Court. Gibson was accordingly sentenced to serve two years in prison. Upon his release in September, 1945, the local board placed him in Class IV-E, continued him therein following a personal appearance, and the board of appeal affirmed. Upon his appeal to the Director of Selective Service, the local board reclassified him to IV-F on November 27, 1945, due to his still being under the jurisdiction of the Board of Parole. On February 6, 1946, the local board reopened his case and placed him in Class IV-E. Upon personal appearance he filed considerable evidence of his ministerial status. On February 27, 1946, he was continued in IV-E. On April 10, 1946, he was continued by the board of appeal in IV-E. The Director of Selective Service thereupon took an appeal to the President in his behalf. Notice of classification in IV-D by the President was mailed to Gibson on June 5, 1946.

(7) Howard M. Hilborn registered with Local Board No. 251, Los Angeles, California, February 14, 1942. He filed questionnaire claiming exemption and classification in IV-D as a minister. He filed documentary evidence showing his ministerial status. In June, 1942, the local board placed him in Class I-A. He was continued therein following his personal appearance. This classification was affirmed by the board of appeal. He failed to report for induction on December 1, 1942, and was thereafter proceeded against and sentenced to a term of one year in prison in February, 1943. While in prison he was placed in class I-A by the prison panel board, October, 1943. He was released on December 25, 1943, and the local board, contrary to the Regulations, without giving him an opportunity of a personal appearance or appeal, sent him an order to report for induction about a week later. He endeavored to have his case reopened to permit him to appeal but the clerk informed him he had

no such right. However, he filed information as to his ministerial status showing that he had been one of Jehovah's witnesses since April, 1941, and a full-time pioneer minister since October 12, 1942. Upon calling upon the chairman of the local board, his induction was withdrawn and Class IV-D mailed to him on January 25, 1944.

(8) Charles K. Honaker registered on February 16, 1942, with Local Board No. 1, Charleston, West Virginia. He was a student of Jehovah's witnesses at the filing of his questionnaire and did not claim to be a minister. He had been associated with Jehovah's witnesses all his life but did not consecrate until July, 1942. On October 12, 1942, he was appointed as a full-time pioneer minister. The local board placed him in Class I-A on July 23, 1942. He was continued therein by the board of appeal on September 4, 1942. He was ordered to report for induction on September 19, 1942, and failed to report, because the local board had refused to consider the evidence he filed concerning his ministerial status. He was subsequently tried and sentenced to serve 2½ years' imprisonment in December, 1942. The Fourth Circuit Court of Appeals affirmed the conviction on May 4, 1943 (135 F. 2d 613), holding that the draft board did not arbitrarily classify Honaker. Upon release from prison he resumed his full-time ministry. The local board again refused to recognize his ministerial status but, on appeal, the board of appeal placed him in Class IV-D in October, 1945.

(9) Floyd E. Hull registered with Local Board No. 2, Somerset, Ohio, July 11, 1941. He filed questionnaire on August 20, 1941, claiming classification in IV-D as a minister of religion. He had been one of Jehovah's witnesses since November, 1935. He was appointed as a full-time pioneer minister on September 1, 1941. He was placed in Class I-A-O by the local board on September 19, 1941. The board of appeal affirmed the classification in December, 1941. He requested a reconsideration of his case and, on

March 20, 1942, he received another I-A-O classification. He endeavored to appeal but was denied the right. He was thereafter ordered to report for induction on April 21, 1942. He did not appear. Thereafter the local board sent him an occupational questionnaire to fill out and return in August, 1942. Apparently the local board eventually permitted the appeal from the I-A-O classification given on March 20, 1942, for he received notice of classification by the board of appeal into IV-E on February 16, 1943. While his case was still before the board of appeal in December, 1942, he filed considerable additional evidence of his ministerial activity and again requested IV-D classification. During 1943 the local board sent various notices to Hull to respond for induction but for various reasons the notices were defective. One of these was an order sent to Local Board at Lawrenceburg, Indiana, to assign Hull to a civilian public service camp. That local board objected to so doing because it recognized Hull as a minister entitled to Class IV-D and wrote to the State Director at Indianapolis concerning the matter. (See opinion of the Seventh Circuit Court of Appeals in a later case where Hull's habeas corpus was affirmed, 151 F. 2d 633.) He was thereafter again ordered to report to a camp and declined. Upon trial in July, 1944, and August, 1944, Hull agreed to report to the camp, after the court found him guilty and offered to suspend his sentence of five years and put him on probation with the understanding that he would so report. It was understood that he would report and file application for habeas corpus. He reported to the camp on September 28, 1944, and thereafter instituted a civil action by filing petition for writ of habeas corpus. On February 9, 1945, Hull was discharged from custody. (61 F. Supp. 732) An appeal was taken from the judgment. The judgment was affirmed by the Seventh Circuit Court of Appeals on November 6, 1945. (151 F. 2d 633) There the Court said: "We have serious doubt that there was any justification for the Board's refusal origi-

nally to classify relator in 4-D. Whatever be thought, however, of the Board's original action in this respect, there can be no question but that subsequent proof conclusively demonstrated that he was entitled to such classification."

(10) Charles V. Hultquist registered with Local Board No. 5, Cranford, New Jersey, February 16, 1942. He had been one of Jehovah's witnesses since 1939 and a full-time pioneer minister since April 1, 1942, at the time he filed his questionnaire. In the questionnaire he filed additional proof of his ministry. He was placed in Class IV-E by the local board. He filed a copy of his ordination certificate with the local board and appealed. Upon reconsideration the local board placed him in Class I-A. The board of appeal affirmed. In October, 1942, he was directed to report for induction. Upon refusing to do so he was tried and sentenced to serve three years' imprisonment in March, 1943. Upon release in February, 1945, he was given a notice of classification *dated June 27, 1944*, by the prison panel board. He had had no right of appeal therefrom. On April 30, 1945, he filed information with his local board requesting IV-D classification, and showing that he had resumed his full-time ministry. On April 28, 1945, the armed forces accepted him upon a preinduction physical examination. He was ordered to report for induction on May 31, 1945, thereby being denied all procedural rights under the Act and Regulations. The matter was brought to the attention of the Director of Selective Service, who instructed the local board to cancel the induction and reclassify him in harmony with the Regulations. He was thereafter placed in Class I-A by the local board. This was affirmed by the board of appeal on October 2, 1945. On a consideration of his case by the Director of Selective Service, he was given a Presidential IV-D classification in March, 1946.

(11) Henry D. Kelly registered with Local Board No. 178, Van Nuys, California, June 30, 1942. He had been associat-

ed with Jehovah's witnesses since 1937 and served as a full-time pioneer minister since October 1, 1941. He requested exemption as a minister in Class IV-D, when he filed his questionnaire, December 12, 1942. He supplied the board conclusive and extensive evidence of his ministry. The local board placed him in Class IV-E on March 17, 1943. Following a personal appearance he was continued therein. The board of appeal affirmed on May 22, 1943. He failed to report for final-type physical examination on August 7, 1943, and was, on November 8, 1943, sentenced to serve a year and a day imprisonment. He immediately resumed his full-time ministry upon release in August, 1944. He was designated as the presiding minister of the North Hollywood Unit of Jehovah's witnesses on May 21, 1945. On August 9, 1944, he was again placed in Class IV-E by the local board and continued therein following a personal appearance. The board of appeal reclassified him to I-A on May 22, 1945. He endeavored to get the local board to reopen his case and consider the new information about his appointment as presiding minister. The local board declined to reopen. He was ordered to report for induction on July 13, 1945. The Director of Selective Service was asked to take an appeal to the President. Accordingly, on October 15, 1946, the President rendered a IV-D classification.

(12) Clarence W. Kruse registered in October, 1940, with Local Board No. 1, Shelby, Montana. In February, 1941, he filed questionnaire claiming exemption and IV-D classification. He had been one of Jehovah's witnesses since 1935. In late February, 1941, he was placed in Class I-A, later changed to Class IV-E. He appealed and the board of appeal denied his claim for exemption and reclassified him to I-A merely because his name did not appear on a certified official list. He was thereafter ordered to report for induction on September 10, 1941. However, this was can-

celed and the board of appeal reconsidered the case. Thereafter he appeared before a Hearing Officer of the Department of Justice and thoroughly discussed his ministerial activity and filed considerable documentary evidence. The board of appeal placed him in Class IV-E. On October 29, 1942, he was ordered to report for assignment to a civilian public service camp on November 23, 1942. He failed to appear and was thereafter sentenced to serve a term of imprisonment on April 23, 1943. He had at that time been serving as a full-time pioneer minister for six months. Upon his release in February, 1944, the local board reopened his case and on March 23, 1944, placed him in Class I-A. Following a personal appearance he was continued therein and on June 10, 1944, was reclassified to IV-E by the board of appeal. He was then ordered to report for assignment to a camp on August 25, 1944. Upon instruction of the Selective Service National Director the local board placed him in Class IV-D in October, 1944. The local board chairman said, however, that he would see to it that the IV-D was not allowed to stand. Early in 1945 the local board again placed him in Class I-A, and ordered him to take a preinduction physical examination on April 13, 1945. In May, 1945, he was placed in Class II-A(F). The local board, on May 18, 1945, again returned to him his proper classification of IV-D.

(13) Robert W. Mattson registered in October, 1940, with Local Board No. 1, Central City, Nebraska. He was not active at the time as a minister of Jehovah's witnesses. He was placed in Class I-A on February 20, 1941. On August 23, 1941, he was assigned as a pioneer minister. On September 29, 1941, he requested Class IV-D. Upon appeal he was retained in Class I-A. Not reporting for induction on February 10, 1942, he was sentenced to serve three years' imprisonment on January 15, 1943. On February 3, 1945, he was released from prison and was placed in Class IV-E. He

was allowed a personal appearance on February 22, 1945, at which time he called attention to the information on file concerning his ministerial status. Additional information was requested. Upon receiving an affidavit dated February 27, 1945, from the Watchtower Society he filed this with the local board and was favored with Class IV-D.

(14) Howard R. Miller registered with Local Board No. 103, Daly City, California, in July, 1942. He had been one of Jehovah's witnesses all his life and had served as a full-time pioneer minister since July 1, 1939. He filed questionnaire on February 3, 1943, claiming exemption and IV-D classification. He filed copy of his ordination certificate and considerable other documentary proof concerning his ministerial activity. He took a physical examination on February 23, 1943. On the same date he appeared before the local board and discussed his case with the members and filed a statement summarizing his work. He was placed in Class I-A on March 4, 1943. He was continued after another hearing in Class I-A and appealed on March 24, 1943. He filed a comprehensive statement of appeal. On May 4, 1943, he was continued in Class I-A by the board of appeal. He failed to report for induction on September 8, 1943, and was thereafter, on November 4, 1943, sentenced to serve two years' imprisonment. Upon his release in March, 1945, he resumed his full-time pioneer ministry. On August 28, 1945, he was called to the Headquarters of Jehovah's witnesses at Brooklyn, New York, to serve full-time there. On November 14, 1945 (after having remained in Class IV-F given him by the prison panel board while in prison) he was reclassified to I-A by his local board. He mailed a statement of appeal to his local board. On March 13, 1946, he was continued in I-A by the board of appeal. Upon an appeal being taken by the Director of Selective Service, the President placed him in Class IV-D on May 29, 1946.

(15) Henry O. Murphy registered February, 1942, with

Local Board No. 1, Ballinger, Texas. He filed questionnaire claiming exemption and classification in IV-D. The local board placed him in Class I-A and, following a hearing, in Class I-A-O. Such classification was affirmed upon appeal. Early in 1943 he was ordered to report for induction. Failing to do so, he was sentenced to serve a year and a day imprisonment on October 4, 1943. He was given Class IV-E by the prison panel board. Upon release from prison, no action was taken concerning reopening his reclassification. On November 1, 1944, Murphy became a full-time pioneer minister. He called this to the attention of the local board, requesting a reclassification to IV-D. Because his name did not appear on a certified list this was denied him. However, in January, 1946, the local board reopened his classification and placed him in Class IV-D.

(16) Vernon G. Olson registered with Local Board No. 44 at Petaluma, California, on June 30, 1942. He had been one of Jehovah's witnesses since 1937 and had been serving as a full-time pioneer minister since April 19, 1939. He called attention to this when he filed his questionnaire and claimed IV-D classification. On March 27, 1943, he was placed in Class I-A by the local board, in spite of the conclusive evidence filed by him as to his ministerial status. On June 15, 1943, the board of appeal affirmed the classification. He was ordered to report for induction on September 16, 1943. He failed to report. On November 15, 1943, he was sentenced to serve two years' imprisonment. On Conditional Release in April, 1945, he resumed his pioneer ministry. On July 2, 1945, he was again placed in Class I-A. On July 28, 1945, he was reclassified to IV-F by the local board. On March 1, 1946, the local board placed him in Class I-A-O. At a personal appearance he discussed his ministerial status with the local board and filed a number of affidavits from others. Upon continuation by the local board in Class I-A-O he filed a four-page statement of appeal. On June 19, 1946, the board of appeal placed him

in Class I-A. On August 18, 1946, the President placed him in Class IV-D.

(17) Donald E. Stull registered with Local Board No. 2 at Great Falls, Montana, October, 1940. He had been one of Jehovah's witnesses since April, 1941, at the time he filed his questionnaire in May, 1941. He claimed classification as a minister in IV-D. The local board placed him in Classes I-A, I-H and I-A, respectively, the latter classification being in January, 1942. He was continued in such classification by the local board after filing special form for conscientious objector. The board of appeal classified him in IV-E on November 5, 1942. Upon his failure to report for induction on February 3, 1943, he was sentenced to one year's imprisonment in November, 1943. Upon release in August, 1944, he resumed his full-time ministry (to which he had been assigned in April, 1942) and filed additional information relative thereto with the local board. The local board placed him in Class I-A on October 3, 1944. The board of appeal affirmed in November, 1944. However, in view of the fact that the classification by the board of appeal was not unanimous, he had an automatic appeal to the President. Upon such appeal, the President placed him in Class IV-D in January, 1945.

(18) Thomas H. Stull registered with Local Board No. 1, Summersville, West Virginia, February 14, 1942. He filed questionnaire claiming exemption and classification as a minister of religion in IV-D. He showed that he had been one of Jehovah's witnesses since 1935 and a full-time minister since January 1, 1942. He supported his claim with documentary evidence. The local board denied his claim and placed him in Class I-A on June 22, 1942. The board of appeal affirmed on December 9, 1942. He was accepted upon a physical examination on December 9, 1942. He was ordered to report for induction on January 2, 1943. Not reporting, he was arrested on January 13, 1943. He was

released on February 15, 1943, on habeas corpus. The State Director thereupon ordered his classification reopened by his local board. The local board declined to do so. The case was transferred to Local Board 2, Lewisburg, West Virginia. That board placed him in Class I-A on March 26, 1943, allowed him a personal appearance on April 8, 1943, and placed him in Class IV-D on April 10, 1943. Upon his file being returned to his own local board, the classification was reopened and he was, upon appeal to the board of appeal, again placed in Class I-A on July 28, 1943. In January, 1945, he was placed in Class IV-D by the President.

(19) Harold T. Watts registered with Local Board No. 1, Lewistown, Pennsylvania, October, 1940. He had been one of Jehovah's witnesses since 1934, had served as presiding minister of the local congregation since December, 1938, and a full-time pioneer minister since March 1, 1942. He claimed exemption and classification as a minister in Class IV-D. He was denied exemption by both the local board and the appeal boards. He declined to report for induction and was subsequently sentenced to serve two years' imprisonment on March 18, 1943. After his release from prison he was accepted by the armed forces upon a preinduction physical examination on December 28, 1944. While in prison he had been placed in Class IV-E in June, 1944, by the prison panel board. On January 15, 1945, he filed considerable additional documentary evidence as to his ministerial status and requested ministerial Class IV-D. The local board refused to take any action whatever. The State Director refused to direct the local board to reopen and reclassify Watts. Upon the classification given him in prison, from which he had no appeal, he was ordered to report for assignment to a civilian public service camp on February 16, 1945. Upon bringing the matter to the attention of National Headquarters of Selective Service, the local board reopened and reclassified him to IV-E on March 15, 1945. Upon appeal, the board of appeal reclas-

sified him to I-A on April 4, 1945. He was again ordered to report for induction on April 23, 1945, but it was canceled and the board of appeal again classified him to IV-E, May 17, 1945. The Director thereupon took an appeal to the President, resulting in Class IV-D by the President on August 7, 1945.

(20) George A. Williams registered with Local Board No. 1, Burlington, N. C., September 14, 1943. He had been one of Jehovah's witnesses since 1935 and a full-time pioneer minister since January 1, 1943. He claimed exemption and IV-D classification, filing with his questionnaire much corroborative evidence as to his ministry. On October 26, 1943, the local board placed him in Class IV-E. On April 4, 1944, the board of appeal placed him in Class I-A. Thereafter he was ordered to report for induction. Failing to do so, he was arrested and was brought to trial on September 25, 1944. The jury found him guilty. Sentence was deferred until November 6, 1944. At that time Judge Johnson Hayes sentenced him to two years but placed him on two years' probation. At the conclusion of his probation period, he was placed in Class IV-D.

III

Cases indicating prejudice by draft boards and where due process was denied by said boards.

(1) Thomas Balogh registered with Local Board No. 194, New York City, on March 26, 1945. In his questionnaire he showed he was a part-time minister and engaged in secular work part-time to support himself. He claimed exemption as a minister of religion. While his case was pending before the local board it was referred to the advisory board and theological panel of the New York Headquarters of Selective Service. The panel board applied orthodox standards in recommending the rejection of his claim for exemption. The local board later gave Balogh a hearing where the members of the board prejudicially stated that they would not classify any one of Jehovah's witnesses as a minister of religion. The statement of the local board and the illegal process followed by the theological panel board was held by the Second Circuit Court of Appeals to be a violation of Balogh's rights to procedural process, requiring a dismissal of the indictment. (*United States* v. *Balogh*, 157 F. 2d 939) The Government petitioned for writ of certiorari. *United States* v. *Balogh*, No. 800 October Term 1946. Certiorari was granted and the judgment of the Circuit Court of Appeals was vacated on February 3, 1947, because of the applicability of the decision of this Court in *Falbo* v. *United States*, 320 U. S. 549. (67 S. Ct. 625; rehearing denied 67 S. Ct. 633) The judgment of conviction in the *Balogh* case was ordered affirmed because he failed to exhaust his administrative remedies.

(2) Ralph H. Cahoon registered with Local Board No. 9, at Houston, Texas, October 9, 1943. He showed in his questionnaire that he had been serving as a minister since August, 1936, and that he worked part-time as a clerk but that the secular work did not interfere with his min-

isterial service. He furnished considerable documentary proof of his ministerial activity. There was no evidence whatever in his file to dispute his claim. On October 28, 1943, he was placed in Class I-A. Following a hearing before the board, his classification was changed to I-A-O. He thereupon appealed to the board of appeal. His case was referred to a Hearing Officer of the Department of Justice who reported to the Selective Service that "undoubtedly registrant is a minister within the meaning of the law. He performs all the essential functions of a minister." When Cahoon's case got into the courts (due to his refusal to report for induction) the chairman of the board of appeal stated that there was no evidence in the file to indicate that Cahoon was not a minister, but that the appeal board did not think he was a minister. The vice-chairman of the board of appeal testified that several years before he had prepared a brief on Jehovah's witnesses based on a book he had bought in St. Louis and that each member of the board of appeal was given a copy of the brief as a guide in classifying all of Jehovah's witnesses. Such brief had been prepared two years before Cahoon was classified. The board of appeal placed him in Class I-A. When he was ordered to report for induction, he complied, but declined to submit to induction. He was sentenced to serve thirteen months' imprisonment on March 1, 1945. Judgment was affirmed by the Fifth Circuit Court of Appeals on January 9, 1946. (152 F. 2d 752; rehearing denied April 25, 1946, 155 F. 2d 150) Certiorari was denied October 14, 1946. (67 S. Ct. 57; rehearing denied January 20, 1947, 67 S. Ct. 619) On a return of the mandate, the district judge suspended the sentence previously imposed. *March 15, 1947, the local board gave him IV-D.*

(3) William M. Estep registered with Local Board No. 4, Canonsburg, Pennsylvania, June 30, 1942. He claimed exemption and IV-D classification and filed supporting proof of his claim. The local board placed him in Class I-A.

The board of appeal affirmed. He reported for induction but declined to submit to induction. He was sentenced to serve five years' imprisonment on December 20, 1944. The Third Circuit Court of Appeals affirmed on July 6, 1945. (150 F. 2d 768) This Court reversed and remanded the case on February 4, 1946. (327 U. S. 114) On trial in the district court it was shown that the local board refused to incorporate in Estep's file information filed by him, so that it would be available to the board of appeal, and it refused to reopen his case and consider the additional information in proof of his ministry. In order to show the prejudicial and arbitrary action of the local board in denying Estep his rights under the Act and Regulations, reference is made to pages 9-30 of the record in the *Estep* case, which is the cross-examination of the local board clerk. After the return of the mandate to the district court, the President of the United States placed Estep in Class IV-D and the Government moved to dismiss the case.

(4) Nick Falbo registered with Local Board No. 11, West Newton, Pennsylvania, October, 1940. He had been one of Jehovah's witnesses since 1930 and a full-time pioneer minister since September 1, 1940. He filed his questionnaire, August 23, 1941, requesting IV-D classification as a minister of religion. On August 25, 1941, he was placed in Class I-Tentative and on January 19, 1942, in Class I-A. He duly appealed and was reclassified by the board of appeal in IV-E on June 17, 1942. He was again placed in Class IV-E by the local board on July 15, 1942. He was accepted upon a final-type physical examination, thus exhausting his administrative remedies. He failed to report for assignment to a civilian public service camp on September 2, 1942, and was thereafter arrested, tried and sentenced to serve five years on December 1, 1942. The Third Circuit Court of Appeals affirmed (135 F. 2d 464) and this Court affirmed. (320 U. S. 549) Note that upon personal appearance when Falbo was first classified, the chairman

of the local board stated, "I do not have any damned use for Jehovah's witnesses." (Transcript of the Record 33, No. 73 October Term 1943) This statement was referred to by Mr. Justice Murphy in his dissenting opinion. This Court in effect reversed the *Falbo* decision in its opinion in *Estep* v. *United States*. The facts in the case of *Dodez* v. *United States* (No. 86, October Term 1946) are identical with the facts in the *Falbo* case. The Court was requested to reverse the *Falbo* decision in the *Dodez* case on the ground that it misapprehended the Regulations in the *Falbo* case. The Court declined to so hold. (See the opinion in *Dodez* v. *United States*, 67 S. Ct. 301.)

(5) Verna L. Garland registered with Local Board No. 1, Leon County, Texas, in October, 1940. He claimed classification as a minister of religion in IV-D. The local board placed him in Class IV-E on May 16, 1941. On January 20, 1942, he was placed in Class I-A, on oral testimony of neighbors of Garland according to the local board. Neither this testimony nor testimony given by Garland on a personal appearance was reduced to writing, as required by the Regulations, for the benefit of the board of appeal in passing on the same information considered by the local board. The board of appeal affirmed. He failed to report when ordered to report for induction and was subsequently sentenced to serve three years' imprisonment on November 20, 1942. While in prison he was accepted upon a preinduction physical examination, May 19, 1944. Upon release in 1945 he was again placed by the local board in Class I-A, which was affirmed by the board of appeal. No preinduction physical examination was given him prior to the order to report for induction on June 11, 1945. He was again tried upon refusal to report for induction and on March 6, 1946, sentenced to serve three years' imprisonment. His case was affirmed by the Fifth Circuit Court of Appeals on December 3, 1946. (158 F. 2d 93) The prejudice of the local board

against the entire organization is shown in that it stated that it would not classify any of Jehovah's witnesses as ministers.

(6) Floyd E. Hull. For a summary of his dealings with the local board, registration, classifications, etc., reference is made to pages 23 to 25 of this appendix. Particular attention is here drawn to the fact that the local board in Lawrenceburg, Indiana, complained of the prejudice and arbitrary action taken by Hull's original local board at Somerset, Ohio, since all evidence showed that Hull was engaged full-time as a minister. The Seventh Circuit Court of Appeals, in affirming the judgment of the District Court in discharging Hull on a writ of habeas corpus (61 F. Supp. 732) intimated that prejudice and arbitrary action were in evidence as indicated by the closing remarks of the opinion, which see, 151 F. 2d 633.

(7) Willian T. Klopp registered with Local Board No. 4, Middletown, Ohio, October, 1940. He claimed ministerial exemption and classification when filing questionnaire June 12, 1941. He was placed in Class III-A due to being married. On November 15, 1943, he was placed in Class IV-E. On a personal appearance on November 29, 1943, notes, containing, false and distorted statements to the prejudice of Klopp, were taken by the secretary of the local board and subsequently presented to the board of appeal. He requested a reopening of his case in order that the inaccurate and prejudicial report might be corrected. This was denied. His IV-E classification was affirmed by the board of appeal and he was subsequently ordered to report for assignment to a civilian public service camp. Failing to do so he was arrested and thereafter sentenced to serve a term of five years and pay a fine of $3500. His case was affirmed by the Sixth Circuit Court of Appeals on March 26, 1945. (148 F. 2d 659) This case is identical in every respect to the case of *Dodez* v. *United States*. He had been accepted

upon a preinduction physical examination prior to his assignment to go to the camp, thus exhausting his remedies. At the time he was ordered to report no physical examinations were given assignees at the civilian public service camps. Therefore the rule of *Dodez* v. *United States* applies. (67 S. Ct. 301)

(8) Louis D. Smith registered with Local Board No. 68, Columbia, South Carolina, December 24, 1942. He had been active as a minister since September, 1938, and requested classification in IV-D. He filed considerable evidence as to his ministry, all of which the local board ignored. He was placed in Class I-A on April 2, 1943. He was refused the right to discuss his case orally at a subsequent personal appearance. He was continued in Class I-A-O following the personal appearance. He requested another personal appearance, at which time he was permitted to discuss extensively his ministerial status and preparation for the ministry. The chairman of the local board (at Smith's trial in the district court) testified that the local board considered all this oral evidence offered at this concededly extensive hearing. The local board, contrary to the Regulations, failed to reduce to writing this oral evidence, thus depriving the board of appeal of the information considered by the local board in arriving at its conclusions. This in spite of his offer at the hearing to produce an abundance of additional written evidence, which the board informed him positively was not necessary. Smith was informed at the conclusion of the hearing that his I-A classification would be continued. Upon appeal the I-A was continued by the board of appeal, but as there was a dissenting vote, his case went to the President, who continued him in Class I-A on August 8, 1943. Smith realized for the first time that the local board had falsely told him that he did not need to submit additional written evidence to corroborate his claim and that the board of appeal and the President did not have the benefit of the extensive oral testimony he had

given at the hearing. He thereupon prepared elaborate statements and obtained considerable affidavits from others who testified to his ministerial status and showed that he was at that time serving as a full-time pioneer minister. The Government Appeal Agent requested the local board to reopen and reconsider Smith's classification, inasmuch as it had denied him the right to file the proof before. The request was arbitrarily denied. Upon Smith's reporting at the board and requesting a reopening, it was also denied him. The local board arbitrarily and capriciously held that this was not new evidence sufficient to warrant a reopening, in view of previous illegal withholding of the same evidence from the appeal agencies of the Selective Service System. Smith was thereafter ordered to report for induction. He reported but declined to submit, but was nevertheless inducted. He was thereafter released from the army, was retried, found guilty, his case affirmed upon appeal, and reversed by the Court. (See 53 F. Supp. 583; 148 F. 2d 288; 327 U. S. 114) He was again tried in the district court and found guilty and his case reversed by the Fourth Circuit Court of Appeals on July 29, 1946. (157 F. 2d 176) He is again awaiting trial in the district court.

(9) Thomas H. Stull registered with Local Board No. 1, Summersville, West Virginia, February 14, 1942. He filed questionnaire claiming exemption and classification as a minister of religion in IV-D. He showed he had been one of Jehovah's witnesses since 1935 and a full-time pioneer minister since January 1, 1942. He supported his claim with documentary evidence. The local board denied his claim and placed him in Class I-A on June 22, 1942. The board of appeal affirmed on December 9, 1942. He was accepted upon a physical examination on December 9, 1942. He was ordered to report for induction on January 2, 1943. Not reporting he was arrested on January 13, 1943. He was released on habeas corpus on February 15, 1943. His classification was ordered reopened by the State Director,

but the local board declined to do so. Due to the extreme prejudice manifested by his local board, the Selective Service System transferred his case and file to Greenbrier County Local Board No. 2. That board, on March 26, 1943, placed him in Class I-A. Following a personal appearance, the local board for Greenbrier County reclassified him to IV-D on April 10, 1943. The file was thereupon returned to his local board at Summersville. Without notice to Stull, the State Director, due to prejudice generated by the Summersville local board, appealed his case to the board of appeal, which again placed him in Class I-A on July 28, 1943. On October 4, 1943, Stull was ordered to report for induction on October 15, 1943. He declined to do so. Upon trial before Judge Ben. Moore, he was found guilty, but the court felt that he was exempt as a minister and the court sentenced Stull to *ten days* only. The President placed him in Class IV-D, January, 1945. The local board showed extreme prejudice. Stull was acquainted with two members of the local board, one of whom had stated that he was prejudiced against Jehovah's witnesses and would do all that he could to put every one of them into the penitentiary, another member had previously demonstrated his extreme prejudice and hatred of Stull and of Jehovah's witnesses by participating, as a conspirator, with one Martin Catlette, in a mob assault against Stull. (*Catlette* v. *United States*, 132 F. 2d 902, 907) The attack had been made because Stull and his fellow ministers had refused to discontinue preaching the gospel.

(10) William A. Wells registered with Local Board for Leon County, Texas, June 30, 1942. He has been one of Jehovah's witnesses since November, 1939. He claimed ministerial classification when filing questionnaire in November, 1942. The board placed him in Class I-A on January 19, 1943. He had one or two hearings, at neither of which did the local board, in accordance with the Regulations, reduce to writing the oral testimony offered by Wells. Upon appeal he was continued in Class I-A on February 3,

1943. Upon his refusal to report for induction on June 18, 1943, he was arrested and on November 18, 1943, sentenced to serve two years' imprisonment. Upon release he was given a preinduction physical examination, October 12, 1945. No record appears of his having been reclassified by the local board after release, but his case was sent to the board of appeal, where he received Class I-A on December 4, 1945. He was ordered to report for induction on December 17, 1945. On trial, March 6, 1946, he was sentenced to three years' imprisonment. His case was affirmed by the Fifth Circuit Court of Appeals, December 23, 1946. Certiorari was denied, March 3, 1947. The prejudice of the local board against the entire organization is shown in that it stated that it would not classify any of Jehovah's witnesses as ministers.

IV

Typical cases of full-time ministers denied exemption and IV-D classification.

(1). Vincent C. Arpaia registered with Local Board No. 8-A, New Haven, Connecticut, August 29, 1944. He had been one of Jehovah's witnesses all his life and had been particularly active since 1938. He had been serving as a full-time pioneer minister since June 1, 1944. He filed adequate documentary proof of his ministry with his questionnaire, requesting Class IV-D. The local board denied his claim and placed him in Class I-A. He requested a personal appearance on September 25, 1944, filing therewith a copy of his ordination certificate. Because he inadvertently also said he desired his case appealed, the board denied the personal appearance and following a preinduction physical examination in December, 1944, sent his file on to the board of appeal. The board of appeal affirmed the I-A on February 15, 1945. Thereafter the State Director was requested

to instruct the local board to allow the personal appearance previously denied. This was denied, March 6, 1945. The State Director denied a renewed request on March 12, 1945. However, upon appealing the matter to the National Director the personal appearance was ordered allowed. Class I-A was again continued following the personal appearance. Upon appeal the board of appeal again affirmed the I-A. Arpaia reported for induction on August 18, 1945, but declined to submit to induction. On June 18, 1945, he was sentenced to serve two years' imprisonment. On September 27, 1946, he was released on habeas corpus by United States District Judge J. Joseph Smith. The Government did not appeal the judgment.

(2) Fenton W. Burnside registered with Local Board No. 451, Johnson City, N. Y., July 1, 1941. He had been one of Jehovah's witnesses since 1932 and was associated with the Johnson City congregation of Jehovah's witnesses. On March 1, 1942, he entered the full-time pioneer ministry. When he filed his questionnaire he claimed exemption and classification as a minister and furnished abundant proof of his ministry. The local board declined to grant his claim and placed him in Class I-A on September 24, 1941. The board of appeal affirmed such classification in May, 1942. Upon receiving notice to report for induction, he declined and, in October, 1942, he was sentenced to serve three years' imprisonment. Upon Conditional Release on January 21, 1945, he immediately resumed his full-time pioneer ministry and so informed the local board. He was accepted upon a preinduction physical examination on February 27, 1945. The local board placed him in Class I-A on March 5, 1945. Thereupon the local board requested the United States Board of Parole to suspend his parole to enable them to send him for induction. The suspension was allowed on March 29, 1945. The local board endeavored to persuade him not to appeal from the decision of the local board because he would just be wasting his time. Upon appeal, Class I-A

was affirmed by the board of appeal on March 24, 1945. He was ordered to report for induction on April 24, 1945. Failing to report, he was again brought to trial and on June 14, 1945, sentenced to serve a second term of imprisonment of three years.

(3) George W. Dodez registered on June 30, 1942, with Local Board No. 2, Orrville, Ohio. He had been one of Jehovah's witnesses since January, 1941, and a full-time pioneer minister since May 7, 1942. He claimed exemption and classification as a minister of religion in IV-D, when he filed his questionnaire on September 21, 1942. He filed with the questionnaire documentary proof of his full-time ministerial status. The local board placed him in Class I-A on November 30, 1942. He appeared before the local board on December 7, 1942, and submitted a petition signed by 44 persons stating they recognized him as a minister and that he preached regularly. The board denied him a full hearing. He was continued in Class I-A on December 7, 1942. He requested a rehearing to present additional proof. Upon this being refused he filed a statement of appeal complaining of the action of the local board as being arbitrary, capricious, prejudiced and unfair. He was placed in Class IV-E by the board of appeal on June 11, 1943. The local board therefore declined to reopen his case after he submitted an affidavit and petition showing he was presiding minister over a congregation of Jehovah's witnesses, authorized to perform marriages, baptism, funeral and other such ceremonies and that it would be a hardship on his congregation if he were taken away. He was accepted by the armed forces for training and service upon a preinduction physical examination on February 21, 1944, thus exhausting his administrative remedies. He was ordered to report for assignment to a civilian public service camp on April 21, 1944. Dodez failed to report. Upon trial, Dodez was sentenced to serve a period of five years' imprisonment on December 15, 1944. The judgment of conviction was af-

firmed by the Sixth Circuit Court of Appeals on March 18, 1946. (154 F. 2d 637) On December 23, 1946, this Court reversed the judgment and remanded the cause for a new trial. (67 S. Ct. 301) When the case was returned to the district court, the Government nol prossed the case because it was of the opinion that he was a minister.

(4) William M. Estep registered with Local Board No. 4, Canonsburg, Pennsylvania, June 30, 1942. He claimed exemption and IV-D classification and filed supporting proof of his claim. The local board placed him in Class I-A. The board of appeal affirmed that classification. When ordered to report for induction, he complied, but declined to submit to induction. He was sentenced to serve five years' imprisonment on December 20, 1944. The Third Circuit Court of Appeals affirmed the judgment on July 6, 1945. (150 F. 2d 768) This Court reversed the judgment and remanded the cause on February 4, 1946. (327 U. S. 114) On trial it was shown that the local board illegally refused to incorporate in Estep's file information filed by him so that it would be available to the board of appeal and that it illegally refused to reopen his case and consider the additional information in proof of his ministry. This Court reversed the case because Estep was "denied the opportunity to show that [the] local board exceeded . . . jurisdiction" and a new trial must be had. Upon the return of the case to the district court, the Government dismissed the case, at the instance of the Department of Justice. Estep was again given Class I-A by the local board and the board of appeal. Upon his case being appealed by the Director of Selective Service to the President, he was placed in Class IV-D.

(5) Taze H. Gibson registered with Local Board "A", El Dorado, Arkansas, on June 30, 1942. He had been one of Jehovah's witnesses since 1937 and a full-time pioneer minister since June 15, 1940. He filed his questionnaire on

October 12, 1942, claiming exemption and Class IV-D as a minister of religion. The local board denied his claim and placed him in Class I-A, on November 6, 1942. The board of appeal, on May 8, 1943, placed him in Class IV-E. The Director of Selective Service declined to appeal his case to the President. He was accepted upon a preinduction physical examination on September 22, 1943, and was again in 1944 given such examination and accepted by the armed forces. He was ordered to report for assignment to a civilian public service camp on August 21, 1944. He proceeded to such camp at Hill City, South Dakota, and remained until August 28, 1944, when he was given a physical examination and found physically acceptable. He filed additional evidence of his ministerial activity with the Camp Director and departed. He was sentenced to five years' imprisonment on February 14, 1945. The Eighth Circuit Court of Appeals affirmed on June 15, 1945. (149 F. 2d 751) This Court reversed the judgment and remanded the case for a new trial on December 23, 1945. (67 S. Ct. 301) The Government argued in this Court that Gibson was not a minister and that the draft boards did not err in denying his claim for exemption and for that reason the denial of his right to defend was harmless error. After the case was reversed and sent back to the trial court, the Government voluntarily, and inconsistent with its argument before this Court, nol prossed and dismissed the indictment in preference to going to trial on whether he was a minister. The inconsistency of the Government in this (and the *Dodez*) case is discussed in Reply Brief filed by Gibson in Number 23, October Term 1946.

(6) George R. Gutman registered on July 6, 1942, with Local Board No. 86, San Francisco, California. He had been one of Jehovah's witnesses all his life and particularly active since July, 1939. He had been a full-time pioneer minister since August 8, 1939, and a "special pioneer" minister since May 1, 1942. He filed questionnaire on Septem-

ber 11, 1942, claiming exemption and IV-D classification and filed therewith documentary proof of his full-time ministerial status. The local board placed him in Class I-A on December 10, 1942. Following a personal appearance he appealed his case. On February 10, 1943, the board of appeal affirmed the Class I-A. He failed to report for induction as ordered on May 14, 1943. On June 20, 1943, he was sentenced to serve three years' imprisonment. The federal judge absolutely ignored the fact that Gutman had been a practicing ordained minister and stated that "because you have only worked less than six months [at secular work] since you were fifteen years old, I consider you lazy and indolent." The Ninth Circuit Court of Appeals affirmed the judgment on March 7, 1944. (142 F. 2d. 555)

(7) Floyd E. Hull registered with Local Board No. 2, at Somerset, Ohio, July 11, 1941. He had been one of Jehovah's witnesses since November, 1935. He was appointed as a pioneer minister on September 1, 1941. The history of his dealings with his local board, the prejudicial and arbitrary action taken by his draft board, his trial for alleged violation of the Selective Training and Service Act and the trial of his habeas corpus proceedings are set forth in detail on pages 23 to 25 of this apprendix, to which reference is here made. Also reference is made to the opinion of the Seventh Circuit Court of Appeals in affirming the judgment of the District Court in discharging the prisoner. (151 F. 2d 633)

(8) Otto A. Jensen registered with Local Board No. 723, Valley Stream, New York, February 15, 1942. He claimed classification as a minister of religion when filing his questionnaire on May 15, 1942. He had been one of Jehovah's witnesses since 1936. On August 22, 1942, he became a full-time pioneer minister. While yet a part-time minister, and based on the information he filed with the local board as to his ministerial status as an assistant minister in the local

congregation, the local board placed him in Class IV-D on May 20, 1942. After filing with the local board on December 21, 1942, evidence of having discontinued his part-time ministerial status and having become a full-time pioneer minister, the local board, on January 8, 1943, placed him in Class IV-E, withdrawing his ministerial exempt classification. He was continued in Class IV-E following a personal appearance. The board of appeal reclassified him to I-A on August 17, 1943. He was ordered to report for induction on November 23, 1943. Upon failure to report he was, on March 27, 1944, sentenced to serve three years' imprisonment. The Second Circuit Court of Appeals affirmed the judgment on January 22, 1945. (146 F. 2d 874) Certiorari was denied. (325 U. S. 851).

(9) Frank Kluz registered with Local Board No. 45, Detroit, Michigan, on October 16, 1940. He had been one of Jehovah's witnesses since 1934. He became a full-time pioneer minister on July 23, 1941. He claimed exemption and classification in IV-D as a minister of religion. The local board denied his claim and placed him in Class I-A. The board of appeal reclassified him to IV-E. Failing to report for induction on January 6, 1943, he was sentenced to serve a term of three years' imprisonment on March 12, 1943.

(10) John M. Kulick registered with Local Board No. 254, Jackson Heights, New York City, June 30, 1942. He had been one of Jehovah's witnesses since 1935 and had served as a full-time pioneer during "sch[illegible] vacation" in 1940. He re-entered the full-time service on July 1, 1942. He filed his questionnaire and adequate proof of his ministerial status in November, 1942, claiming exemption and classification as a minister in IV-D. He was first classified in Class I-A by the local board on March 29, 1943, but this was changed by the local board to Class IV-D on April 28, 1943, following the receipt of a letter from Kulick explaining

about Opinion No. 14 of National Headquarters of Selective Service System and additional evidence of his ministerial activity. In August, 1944, the local board received a telephone message from the clerk of another local board stating that a woman was at that local board complaining about Kulick being exempted while her three sons had to serve in the armed forces. On this hearsay evidence, Kulick was arbitrarily denied his ministerial exemption and placed in Class I-A. At a personal appearance he extensively explained his ministerial work, and showed that he spent but two hours weekly in other activity. The local board illegally failed to reduce to writing the oral evidence. He was continued in Class I-A on August 31, 1944. He filed a statement of appeal. He was accepted upon a preinduction physical examination on September 11, 1944. His I-A classification was affirmed by the board of appeal on October 3, 1944. He reported for induction on November 9, 1944, but declined to submit. On May 3, 1945, he was sentenced to serve three and one-half years' imprisonment. His petition for writ of habeas corpus was denied on May 6, 1946. The Second Circuit Court of Appeal remanded the case and released Kulick. (157 F. 2d 811) The case is now before this Court on certiorari granted January 20, 1947, as No. 840, October Term, 1946.

(11) Sam McGee, Jr., registered with Local Board "A", Little Rock, Arkansas, 1942. He had been associated with Jehovah's witnesses since 1939 and had served as a full-time pioneer minister since January 16, 1940. He filed questionnaire in January, 1943, claiming exemption and IV-D classification. Upon the information filed he was placed in Class IV-D by the local board. He was then called for a physical examination and thereafter reclassified to I-A on February 17, 1943. At a personal appearance he filed a copy of his certificate of ordination and appointment as full-time pioneer minister. Following this he was continued in I-A. On June 27, 1943, Class I-A was affirmed by

the board of appeal. He was ordered to report for induction on July 29, 1943. In September, 1943, having failed to report, he was sentenced to serve two years' imprisonment. In October, 1944, he was released and again placed in Class I-A. The local board refused to recognize his ministerial status. Upon again being ordered to report for induction, he refused, and again was sentenced to serve an imprisonment of two years in April, 1945. It should be noted that the only reason this man's name did not appear on the certified official list of ministers was because he registered at about the time the practice of adding names was discontinued. The local board arbitrarily refused to classify him as a minister solely because his name did not appear on said list.

(12) James L. Nelson registered with Local Board No. 1, Butler, Missouri, June 30, 1942. He had been one of Jehovah's witnesses since 1936 and a full-time pioneer since September 1, 1941. Because the practice of adding the names of pioneers to the certified official list by National Headquarters of Selective Service was discontinued shortly after he registered, his name was not added. The local board used this as an arbitrary reason for refusing him Class IV-D. He claimed exemption and classification as a minister, giving adequate and complete proof of his ministerial status when he filed his questionnaire on September 23, 1942. The local board placed him in Class I-A on January 23, 1943. Following a personal appearance he was reclassified to IV-E on February 8, 1943, by the local board. The board of appeal affirmed the IV-E classification on March 20, 1943. The board of appeal had before it when considering his appeal the following prejudicial statement of the local board, made contrary to the Regulations: "the local board was getting their patience fairly well exhausted with this click of Jehovah's witnesses!" The local board thus showed its prejudice against all of Jehovah's witnesses as an organization. The Director of Selective Service thereafter postponed induction process in order to study the case.

While the matter was before National Headquarters the local board directed him to take a final-type physical examination. Believing the order to be improperly issued and since he had been told that the Director was considering his case, Nelson did not report. The local board reported him as a delinquent and he was thereafter brought to trial before Federal Judge M. E. Otis on June 29, 1943. Judge Otis found Nelson "not guilty", because there was no evidence to support the board's decision that Nelson was not a minister. The local board thereafter again placed him in Class I-A on August 7, 1943. He appealed therefrom and attached a copy of Judge Otis' opinion to his statement of appeal. He also attached affidavits from other ministers substantiating his ministerial claim. Upon direction of the State Director the local board reopened his classification and placed him in Class IV-D on August 28, 1943. On October 1, 1943, he was called before the local board and questioned thereafter by an agent of the FBI, who "shadowed" him in his ministerial work for several days. On January 31, 1944, five months after being given IV-D, the State Director again ordered his classification reopened by the local board and, on February 5, 1944, the local board placed him in Class IV-E. He appealed showing there was no change in his ministerial status to warrant a reopening of his classification under the Regulations. He was accepted upon a preinduction physical examination on March 30, 1944, and was thereafter continued in Class IV-E on June 19, 1944, by the board of appeal. In view of the peculiar circumstances in his case, the Director of Selective Service took an appeal in his case and on September 12, 1944, he was given Class IV-D by the President.

(13) Royal W. Rea registered with Local Board No. 1, Miami, Oklahoma, on April 6, 1943. He had been one of Jehovah's witnesses since 1938 and a full-time pioneer minister since August 1, 1941. With his questionnaire, in which he claimed exemption and IV-D classification, he filed copy

of his ordination certificate and pioneer appointment. He was placed in Class I-A by the local board on June 9, 1943. After a personal appearance on June 18, 1943, he was continued in Class I-A. He appealed for Class IV-D. The local board thereafter directed him to appear before it in October, 1943. He discussed his case orally with the board, but no record was made of such discussion for the benefit of the board of appeal, contrary to the Regulations. The board of appeal, on March 20, 1944, affirmed the Class I-A. He was accepted upon a preinduction physical examination on March 31, 1944. He reported for induction on June 27, 1944, but declined to submit to induction, thus exhausting his administrative remedies. Thereafter, on September 30, 1944, he was sentenced to serve three years' imprisonment. His case is identical to that of Estep. (*Estep* v. *United States*, 327 U. S. 114) Moreover, it is the same as *United States* ex rel. *Kulick* v. *Alexander*, No. 840, October Term 1946. After the decision in the *Estep* case, Rea applied for habeas corpus. The writ was denied. He appealed to the Fifth Circuit Court of Appeals where the order denying the writ was affirmed. (153 F. 2d 190) He applied for writ of certiorari two weeks after the decision in the *Estep* case. The petition for writ of certiorari was denied. (327 U. S. 794; rehearing denied, 327 U. S. 819) The extraordinary and unusual granting of the writ of certiorari in the cases of *Sunal* v. *Large* and *Kulick* v. *Alexander* (Nos. 535 and 840, October Term 1946) and the denial of certiorari in Rea's case is an inconsistency. See the discussion of two courts of appeals concerning the extraordinary denial of the writ of certiorari in the *Rea* case. (*Sunal* v. *Large*, 1[illegible] F. 2d 165; *United States* ex rel. *Kulick* v. *Kennedy*, 157 F. 2d 811)

(14) Alex Rinko registered with Chicago (Illinois) City Board No. 122, October 16, 1940. He had been one of Jehovah's witnesses since 1931 and a full-time pioneer minister since 1939. In March, 1941, he filed his questionnaire claiming classification as a minister. On April 18, 1941,

the local board placed him in Class I-A. Rinko filed a statement of appeal. Upon the questionnaire and additional supporting proof on file, the board of appeal reversed the local board and, on July 3, 1941, placed him in Class IV-D. His file showed that he served without charge as a minister of the North Unit of the Chicago Company of Jehovah's witnesses and regularly performed all the usual ministerial functions. On April 26, 1943, the local board reopened Rinko's classification and placed him in Class I-A-O and he was so notified on June 3, 1943. He appeared for a hearing on June 14, 1943. The local board denied a hearing completely by refusing Rinko the right to discuss his classification, to point out evidence in his file that the board overlooked and to offer additional oral testimony, all contrary to the Regulations. The local board, also contrary to the Regulations, refused to accept additional written evidence. He filed a written appeal on June 16, 1943, and sent along evidence which the local board had refused to accept. Later, on direction of the State Director, the local board accepted the written evidence and sent it to the board of appeal for consideration. He was placed in Class I-A by the board of appeal on January 11, 1944. He was accepted by the armed forces at a preinduction physical examination on February 19, 1944. On April 13, 1944, he reported for induction and was again accepted for service but declined to submit to induction, thus exhausting his administrative remedies. Thereafter he was tried before Judge W. J. Campbell without a jury at Chicago, Illinois, September 20, 1944. On October 17, 1944, Judge Campbell rendered judgment upon his finding of guilty, suspended the imposition of the sentence and placed Rinko on probation for a period of two years. He refused to commit Rinko to the custody of the Attorney General and to impose a sentence because he was of opinion that Rinko was a minister, exempt from training and service under the Act, and that the draft boards improperly classified him. An appeal was duly taken to the

Seventh Circuit Court of Appeals. In spite of the fact that Rinko had fully exhausted his administrative remedies by reporting at the induction station and refusing to be inducted, the court of appeals held that he could not defend. The court applied the *Falbo* rule and held that no defense was available to a prosecution under Section 11 of the Act. (*Rinko* v. *United States,* 147 F. 2d 1) Certiorari was denied by this Court. (325 U.S. 851. Rehearing denied, 325 U. S. 894) In spite of the denial of certiorari in the *Rinko* case this Court (the same date, May 28, 1945, that it denied rehearing on the petition for writ of certiorari in the *Rinko* case) granted certiorari in the case of *Smith* v. *United States,* 325 U. S. 846. This Court recognized that the petition for writ of certiorari in the *Rinko* case presented precisely the same question that was posed to the Court in the *Estep* case. (*Estep* v. *United States,* 327 U. S. 114, Note 15) It is highly unjust that Rinko should be convicted and should have unsuccessfully prosecuted an appeal from the conviction all the way to this Court when, on the same facts and circumstances, Smith and Estep successfully prosecuted their appeals.

(15) Theodore M. Sunal registered with Local Board No. 26, at Pittsburgh, Pennsylvania, October, 1940. He had been one of Jehovah's witnesses since 1935. When he filed his questionnaire on January 15, 1941, he did not claim to be a "minister of religion" for reasons given later, but he did ask for Class IV and showed he was engaged in ministerial work. He later filed Special Form for Conscientious Objector further clarifying his claim. He was placed in Class I-A by the local board on May 10, 1941. He submitted further documentary evidence as to his status on May 15, 1941. He had a personal appearance on June 24, 1941, following which the local board continued him in Class I-A on July 1, 1941. He appealed. He appeared before a Hearing Officer of the Department of Justice on December 30, 1941, and discussed orally his case and submitted written evi-

dence which became a part of his file for the consideration of the board of appeal. The board of appeal affirmed Class I-A on January 27, 1942. He failed to report for induction on March 19, 1942. On May 9, 1942, he was sentenced to serve two years' imprisonment. On January 1, 1944, upon his release from prison on parole, he entered the full-time pioneer service of Jehovah's witnesses. In order to support himself in the ministry, he engaged part time in secular work. On May 19, 1944, upon Sunal's complete sentence being satisfied, the local board placed him in Class I-A. Upon a personal appearance on June 9, 1944, he filed exhaustive statements, affidavits and petitions supporting his ministerial claim. His claim was again denied and he was placed in Class I-A by the local board on June 24, 1944. On July 3, 1944, he appealed and filed more evidence of his ministerial activity. He was accepted upon a preinduction physical examination on July 28, 1944. The board of appeal affirmed the 1-A classification on September 12, 1944. He reported for induction on October 25, 1944, but declined to submit to induction, thus exhausting his administrative remedies. Upon trial, he offered evidence for the purpose of establishing that the draft boards had denied him his rights under the Act. In spite of his having exhausted his administrative remedies, the Court instructed the jury that the draft board classification could not be attacked in defense to the indictment. Sunal was sentenced to serve five years' imprisonment on March 22, 1945. This was his second conviction under the Act. Petition for writ of habeas corpus was filed by Sunal on March 11, 1946. The writ was discharged by Judge Ben Moore in April, 1946. The Fourth Circuit Court of Appeals affirmed on July 29, 1946, (157 F. 2d 165) and certiorari was granted on January 20, 1947. The case is docketed as No. 535, October Term 1946.

V

Typical cases of part-time ministers denied exemption and IV-D classification.

(1) Harold E. Goodrich registered with Local Board No. 4, New Orleans, Louisiana, October, 1940. He had been one of Jehovah's witnesses since 1934. At the time of his registration he was serving as a full-time pioneer, but he had to relinquish such full-time activity on March 26, 1941. He filed questionnaire on April 24, 1941, claiming exemption and classification in IV-D. He stated he was a minister and regularly served as such. The local board placed him in Class I-A on January 23, 1942. He was continued in such classification by the board of appeal on February 13, 1942. He filed additional evidence with the local board as to his ministerial status, which the local board received on May 20, 1942, but refused to consider as meriting a reopening of his case. He declined to report for induction and was thereafter sentenced to serve a year and a day on December 10, 1942. At that time he had been serving as a full-time pioneer since October 1, 1942. Upon release from prison he resumed his full-time pioneer ministry and the local board again, on September 29, 1943, placed him in Class I-A. The board of appeal affirmed on October 29, 1943. He was accepted upon a preinduction physical examination on February 12, 1944. On March 14, 1944, he declined to report for induction and was sentenced to a term of fifty-nine months on May 22, 1944. The Fifth Circuit Court of Appeals affirmed the judgment on December 21, 1944. (146 F.2d 265)

(2) Herman H. Grieme registered with Local Board No. 2, Westwood, N. J. He was company servant and presiding minister of a congregation of Jehovah's witnesses at the time. He had been one of Jehovah's witnesses since January, 1935. He claimed exemption and IV-D classification.

The local board placed him in Class IV-E, which classification the board of appeal affirmed. He again appealed on July 14, 1941. The local board thereupon placed him in Class III-A, a dependency classification. On January 6, 1943, the local board reopened his case and placed him in Class IV-E. Following a personal appearance he was continued therein on February 5, 1943. He filed statement of appeal and the board of appeal affirmed the IV-E classification on April 13, 1943. He was accepted by the armed forces on a preinduction physical (final-type) examination on May 1, 1943, thus exhausting his administrative remedies. He did not report for assignment to a civilian public service camp on July 30, 1943. He was sentenced to serve a term of imprisonment, December 3, 1943. The Third Circuit Court of Appeals affirmed the judgment on March 15, 1944. (141 F. 2d 495) Certiorari was denied, May 22, 1944, 322 U. S. 744.

(3) William T. Klopp registered with Local Board No. 4, Middletown, Ohio, October, 1940. He claimed exemption and IV-D classification when filing questionnaire, June 12, 1941. He had been a minister of Jehovah's witnesses since June, 1940. He was placed in Class III-A by the local board, due to his marital status, on June 16, 1941. On November 15, 1943, the local board placed him in Class IV-E. On a personal appearance on November 29, 1943, notes were taken by the Secretary of the local board and subsequently presented to the board of appeal, containing false and distorted statements to the prejudice of Klopp. A reopening of his case to correct the prejudicial report was denied Klopp. The board of appeal affirmed the IV-E classification and he was ordered to report for assignment to a civilian public service camp. Failing to do so he was brought to trial and sentenced to a term of five years and a fine of $3500, on May 15, 1944. The Sixth Circuit Court of Appeals affirmed the judgment on March 26, 1945. (148 F. 2d 659) This case

is identical to that of *Dodez* v. *United States*, 67 S. Ct. 301. Klopp was accepted upon a preinduction physical examination prior to his assignment to camp, thus exhausting his remedies. At the time he was ordered to report, no physical examinations were given assignees at the civilian public service camps. The rule of *Dodez* v. *United States* applies.

(4) Charles J. Meng registered in October, 1940, with Local Board No. 14, Bellevue, Pennsylvania. He had been one of Jehovah's witnesses since July, 1935. He filed his questionnaire on January 8, 1941, claiming exemption and IV-D classification. He filed Special Form for Conscientious Objector on January 23, 1941, to further explain his ministerial status. On March 6, 1941, he was placed in Class I-B by the local board. This was changed to Class IV-E on March 13, 1941. He had a personal appearance on March 23, 1941, and was continued by the local board in Class IV-E on May 5, 1941. On May 5, 1941, he became the presiding minister of the West End Unit of the Pittsburgh Company of Jehovah's witnesses and so informed the local board. On September 25, 1941, he was placed in Class IV-E-H due to his age, and again placed in Class IV-E on February 17, 1942. Upon appeal, he was continued in such classification on August 13, 1942. He was accepted upon a final-type physical examination on September 27, 1942, thus exhausting his administrative remedies. He failed to report for assignment to a civilian public service camp on November 19, 1942, and was sentenced to serve five years' imprisonment on June 2, 1943. The judgment was affirmed by the Third Circuit Court of Appeals on February 11, 1944, 140 F. 2d 315.

(5) Homer F. Parsons registered with Local Board No. 133, Brooklyn, New York, October, 1940. He had been one of Jehovah's witnesses all his life. He filed his questionnaire on January 8, 1941, claiming exemption and classification in IV-D. The local board placed him in Class 1-A

on May 12, 1941. He was continued by the local board in such classification after a personal appearance when he filed additional material supporting his ministerial claim. On July 2, 1941, the local board reclassified him to III-A due to his marital status. On September 28, 1942, he was again placed in Class I-A by the local board. Upon appeal he was continued in Class I-A on April 1, 1943. He failed to report for induction on July 1, 1943, and was subsequently sentenced to serve a sentence of two and one-half years' imprisonment on December 27, 1943. The Second Circuit of Appeals affirmed the judgment on January 22, 1945. (146 F. 2d 874) Certiorari was denied, 325 U. S. 851.

(6) Sigismund F. Swaczyk registered with Local Board No. 96, Medford, Massachusetts, October, 1940. He had been one of Jehovah's witnesses since 1939. Due to his marital status he was placed in Class III-A by the local board on January 6, 1941, although he had claimed exemption and IV-D classification when he filed his questionnaire. On May 26, 1943, he was placed in Tentative Class I. Following a physical examination on June 6, 1943, he was reclassified to IV-E on June 14, 1943. He appeared before the local board on June 28, 1943, at which time he filed a statement setting forth his ministerial claim and a statement signed by 56 persons in support of his claim and showing that he served as the assistant presiding minister of the Malden, Massachusetts, Company of Jehovah's witnesses and had done so since November 14, 1941. The local board indicated that the only reason he was not placed in Class IV-D was because his name did not appear on a certified list at State Headquarters of Selective Service System, not a requirement under the Act. He appealed and on November 16, 1943, his classification was changed to I-A by the board of appeal. He submitted a certificate of his appointment on November 18, 1943. The board of appeal placed him in Class II-B (an occupational deferment) on January 17, 1944. The local board reclassified him to I-A on

April 24, 1944, whereupon he appealed and the board of appeal again placed him in Class II-B on June 20, 1944. Again on September 18, 1944, the local board placed him in Class I-A. He had a personal appearance, was accepted on a preinduction physical examination and his case again went to the board of appeal following his acceptance by the armed forces. The board of appeal affirmed the I-A on November 15, 1944. He thereafter was given another personal appearance and again placed in Class I-A by the local board on November 28, 1944, from which an appeal was taken, resulting in the board of appeal again affirming on January 3, 1945. He reported for induction on January 15, 1945, but declined to submit to induction, thus exhausting his administrative remedies. On trial on April 12, 1945, he was sentenced to serve three years imprisonment. (The matter of his engaging part-time in secular work in order to sustain himself in the ministry seemed to be the outstanding reason that the local board would not recognize him as a minister.) On appeal to the First Circuit Court of Appeals, the judgment was affirmed on June 13, 1946. (156 F. 2d 17) Certiorari was denied on October 14, 1946, 67 S. Ct. 77.

LETTER

from Hayden Covington to the Director of Selective Service System, answer to which is printed (pp. 66-74) in Brief filed by the Government in cause No. 840.

LAW OFFICES OF
HAYDEN COVINGTON
117 ADAMS STREET, BROOKLYN 1, NEW YORK
April 23, 1946

General Lewis B. Hershey
Director of Selective Service
Washington, D.C.

Dear General Hershey:

It occurs to me that undue consideration is given to the fact that some of Jehovah's witnesses engage in secular employment as a means to sustain themselves in their ministry. From time to time full-time ministers of Jehovah's witnesses engage in part-time secular work to take care of necessary obligations. The historic nature of the ministerial function of Jehovah's witnesses, according to practice and necessity, requires Jehovah's witnesses to support themselves partially by secular work if they are engaged in the full-time ministry or wholly by secular work if they are engaged in the part-time ministry, unless they have a source of private income or are supported from contributions by friends, relatives of the Society. Time and again men have been placed in Class I-A and appeals have been denied and review by the National Headquarters has been denied, because the file reflects that the particular minister supported himself by secular work. It seems that the denial of the ministerial status to Jehovah's witnesses on this account, when it is not withheld from some clergymen of other denominations, is contrary to State Director Advice 213-B, Part III, paragraph 3, which reads:

"The historic nature of the ministerial function of a registrant's own religious organization must be taken into consideration in each individual case. In some religious organizations both practice and necessity require the minister to support himself, either partially or wholly, by secular work."

It will be appreciated if you will take steps to see that the liberal policy enunciated in this quotation is followed by the State Directors and the members of your staff at National Headquarters in determining whether or not review should be had in cases involving Jehovah's witnesses. I am quite sure that if the draft boards and other members of the Selective Service System had liberally applied the principle announced in this quotation, in harmony with the historic nature of the ministerial function, there would not have been so many thousands of Jehovah's witnesses denied their ministerial status resulting in their incarceration under the Selective Training and Service Act during the war, resulting in hardship and injustice to many registrants who are now behind prison walls.

An effort is being made to alleviate these hardships and injustices through parole granted by the Board of Parole. However, only a small percentage of the men are receiving the benefit of such parole.

Sincerely,

[signed] Hayden Covington